SUPREME COURT, U. S.
APPENDIX

JUL 7 1971

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1536~~ 70-110

WISCONSIN, PETITIONER,

vs.

JONAS YODER, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

PETITION FOR CERTIORARI
FILED APRIL 1, 1971

CERTIORARI GRANTED MAY 24, 1971

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 14, 1968 - Summons and Criminal complaint filed County Court, Green County.

Apr. 2, 1969 - Motion to Dismiss made by respondents.

Apr. 2, 1969 - Trial to Court - County Court, Green County, Wisconsin.

Aug. 15, 1969 - Memorandum Decision rendered by County Court, Green County, denying motion and finding respondents guilty.

Aug. 15, 1969 - Judgment finding respondents guilty entered.

Aug. 22, 1969 - Notice of Appeal to Circuit Court of Green County filed.

Nov. 13, 1969 - Memorandum Decision of Circuit Court of Green County rendered affirming Judgment of County Court of Green County finding respondents guilty.

Feb. 3, 1970 - Stay of Execution filed.

Feb. 5, 1970 - Notice of Appeal to the Wisconsin Supreme Court filed.

Jan. 8, 1971 - Opinions and Judgment of Wisconsin Supreme Court rendered reversing Judgment of Circuit Court of Green County.

State of Wisconsin *Green* County Court Criminal Branch

STATE OF WISCONSIN,

vs. ss. CRIMINAL COMPLAINT

Jonas Yoder,

Defendant

K. J. Glewen being first duly sworn complains and says that did, on the day of ,1968 at the Town of New Glarus, in said County, did unlawfully having under his control, as the father of Freida Yoder a child under the age of 16 years, to wit; 15 years of age fail to cause such child to attend school regularly, during the full period and hours of the 8/28/68 - 10/23/68 of 1968, in the Public Schools of School District New Glarus Joint Dist No 1 of Green & Dane county, Wis. in which he resides, or in any private school, or other Public School, or Vocational School; such child being in proper and mental condition to attend school, and not being exempted for any good cause, by the School Board of the district in which the child resides, and said child, not having completed the full Four Year H. S. course, nor said child having received instructions elsewhere as must be approved by the State Superintendent, all contrary to Sub-Sections (1) (2) (3) and (4) of Section 118.15 of the Wisconsin Statutes.

(The basis or grounds of the complaint is school records and personal knowledge of K. J. Glewen, Supt. of the above described school district; the records being in the custody of said K. J. Glewen, as Supt. of the above named school district)

and against the peace and dignity of the State and prays that the said defendant might be arrested and dealt with according to law;

/s/ K. J. Glewen - Supt.
COMPLAINANT

Subscribed and sworn to before me this *23rd* day of *October*, 1968.

/s/ L. A. Kaemig
☒ District Attorney ☐ County Judge

Identical complaints were filed naming the other two respondents.

STATE OF WISCONSIN, In the County Court of Green County
vs. ss. (Criminal Branch)
ADIN YUTZY,
Defendant No. , Term 1969

MOTION TO DISMISS

AND NOW, this *2nd* day of April, 1969, Motion to Dismiss the complaint in the above captioned action is hereby made on the grounds that the Wisconsin Compulsory School Attendance Law (Section 118.15 of the Wisconsin Statutes, L. 1967 c. 92 s17, eff. Jan. 1, 1968, L. 1967, c 313 s18, eff. Jan. 13, 1968) is unconstitutional as applied to the defendant Adin Yutzy, and as it is applied to Vernon Yutzy, a child under the control of the defendant in that as so applied it deprives him and his said child of religious liberty guaranteed by Article I, Sections 1 and 18 of the Constitution of the State of Wisconsin and by the First and Fourteenth Amendments

to the Constitution of the United States, and of rights of association, of privacy, and of learning guaranteed by Article I, Section 1, of the Constitution of Wisconsin and protected by the Fourteenth Amendment to the Constitution of the United States.

William B. Ball
Ball & Skelly
127 State Street
Harrisburg, Pennsylvania

Thomas C. Eckerle
Risser & Risser
15 West Main Street
Madison, Wisconsin

ATTORNEYS FOR DEFENDANT

PARAPHRASED TESTIMONY FROM PETITIONER'S SUPPLEMENTAL APPENDIX IN THE COURT BELOW

TESTIMONY OF STATE'S WITNESS,
KENNETH J. GLEWEN

EXAMINATION BY
MR. MARTINSON:

My name is Kenneth J. Glewen and I am the School District Administrator of the New Glarus District #1 School, located in Green and Dane Counties. I have had that position for 3 years. My duties are to administer the school financial affairs and transportation, the hiring and releasing of teachers * * * and see to it that all children are in attendance from the ages of 7 to 16 years of age * * *.

As a teacher and administrator, I have been employed 16 1/2 years. I am acquainted with the three defendants in the present case and I know Freda Yoder is the daughter of Mr. Yoder, the defendant, and Barbara Miller, the daughter of the other defendant, as well as Vernon Yutzy.

These children attended public school in New Glarus during my tenure as administrator and they graduated from 8th grade. MR. MARTINSON: "Is there any question the ages are correctly stated in the complaint?

MR. BALL: There is no question.

MR. MARTINSON: I think, Your Honor, the ages of the children are correctly stated in the complaints."

I made an investigation to determine whether or not the two children mentioned attended school at the time between August 28, 1968, and October 23, 1968. * * *

There is not a vocational, technical, adult education school within the New Glarus District.

None of these 3 children were mentioned as having been enrolled in the school at the time I made the investigation. * * *

There is a public high school within the New Glarus district. There is not a private high school within the district. The term "high school" means generally 9th, 10th, 11th and 12th grades. In some areas they have reorganized, so they have a junior high school which is quite often 7th, 8th and 9th grades; and then the senior high school would be 10th, 11th and 12th grades. The curriculum of the school is more difficult and continuing from that of the first eight grades, might differ a little in that there are more elective courses that allow students to pursue particular things they have more interest in. The ages for attendance in high school are generally between 13 and 18 years. There are many good private high schools in the State of Wisconsin that serve their population from grades 9 through 12. * * *

Based on my investigation and observation and information that I have secured, and based upon my knowledge and experience, the schools operated by the Amish could not be classified as high schools. They do not offer a four year course beyond the elementary grades.

CROSS-EXAMINATION OF MR. GLEWEN
BY MR. BALL:

My complaint was filed and based not merely on the absence of the children, but due to the fact that they were not enrolled in any school. They were not enrolled either in the parochial school or the public high school in our district. The complaint was not based in any sense on disobedience or delinquency.

MRS. FOLA THACKER,
DIRECT EXAMINATION
BY MR. MARTINSON:

My name is Fola Thacker a[redacted]ition to being a housewife, I am clerk of the New Gl[redacted]ol Board. I have been clerk for about 3 years. As clerk I have custody of all the books and records and documents pertaining to the school board. None of the three children mentioned have been exempt for legal cause.

DEFENDANTS' TESTIMONY,
KENNETH GLEWEN* * *

EXAMINATION
BY MR. MARTINSON:

The teaching and instruction that is given in the high school in New Glarus has been approved by the Department of Public Instruction of the State.

JOHN HOSTETLER,
DIRECT EXAMINATION
BY MR. BALL:

* * * MR. MARTINSON: I take it you will be referring to the Old-Order Amish only?

A. Right

Q. What are the chief Old-Order beliefs?

A. The Amish have been called Biblicists by historians and theologians. Obviously many groups claim the Bible the central issue of their religion. The Amish are peculiar, however, in four respects in regard to their beliefs. They require--it can be summed up in four--as a part of their way of salvation they require a church community that is separate from the world. Not that they are isolated in this respect, they are not isolated living in monasteries, but are

disbursed in our society. The separation is part of their religion. The Scriptures to them say, "Do not conform to the World, do not be unequally yoked together with unbelievers." These two things are repeated in their sermons and teachings.

The second part of their religion, after the maintenance of the church-community, is the baptismal vow that requires ethical obligation to God and man.

And the third aspect is the maintenance of community rules that are binding on the members. These rules are made in consensus by each congregation under the leadership of a minister.

And finally, I think we would say, central and close to the religion is the affinity to nature-to soil, the simple life, the moderate life best expressed in the rural society. * * *

CROSS-EXAMINATION
BY MR. MARTINSON:

* * * There is a preferred pattern of isolation in the Amish community, but they do not want total isolation of the world, they want to be in the world but not of the world, not in its spirit.

The Amish people justify sending their children even through eighth grade and not through sixth or not to school at all because of the development of education in this country partly. There are more and more requirements in 4th, 6th and 8th grade. That is part of the answer and part of the reason is the Amish want their children to learn the basic skills, and they got this in the one-room public school as long as we had them but once they were evaporated by consolidation there

was a different question. * * * I do not know what curriculum is taught in the high school, but assuming that a child would not be required to indulge in sports and athletics, etc., would not make the attendance by the Amish less objectionable.

The theory is that the children are being exposed to a worldly influence. The Amish child is not restricted to his home grounds, he goes to town and sees other people and other children, but by going to school he is learning a different way of life. It is the worldly influence that the Amish object to. There is a general consensus that the Amish faith will permit children to go through 8th grade of public school but after that the child does not go to a single day of high school. * * * I know of nothing in the Amish religion specifically saying, such as a rule or illustration, that no child of Amish faith could properly attend high school. The rules of the Amish church as such are simply the oral consensus in the community; this represents, I would say, perhaps the most substantial rule of evidence. The church rules are rarely put in print. On occasion in the past there have been some rules printed but they are usually associated with a particular period or whatever issue is present at the time.

My studies indicate that the Old-Order Amish population is much more than it was fifty years ago, there is a gradual increase, but at the same time the Amish have also lost members to their church through the years, and I would say of the total migration to the country, probably two-thirds have been assimilated non-Amish people today. The Amish religious membership is non-static.

TESTIMONY OF DONALD ERICKSON,

DIRECT
BY DEFENDANTS:

I don't think that the Amish have any choice at all educationally. I have never seen a school yet that impresses me either culturally or religiously; there isn't such an animal as a culturally and religiously neutral school. * * * There is no such thing as non-education, every child is educated through the process of child socialization. * * * As to whether education is to equip you to make your way in the world, depends on what you mean by "make your way in the world". Education or schooling or whatever you call it does equip one to function in some culture, and in those terms yes that is a function of education. In my view to prepare the child to lead some kind of adult life with some kind of independence, surety and competency. * * * And whether expressed or implied that we must force upon every child an education that fits him for one particular mode of life, it seems that adults have a right to different ways of life, certainly the child should have the freedom to live any one of the number of ways of different ways of life. If we had one system of education imposed on everyone, this would be harmful to the general welfare.

For the majority of children the typical system of education that we provide the public schools for the most part seems pretty fitting. But I think even here that our educational systems have effects on children that are very bad and this is one reason that I have a particular interest in the Amish case. * * * I am deeply disturbed about the tendency

of our State Department of Education, and some people at the lower educators level, always looking identical and to set up criteria that hasn't a bit of research behind it. * * *

In answer to the question of why a child should not obtain more education in the pattern of a public high school, I would particularly refer to a study conducted by Robert Kollmorgan, he is now Professor of Geography at the University of Kansas, but his conclusion was basically this, that if the functions of education for an Amish child is to prepare him to be an Amish farmer, or an Amish housewife, that indeed a high school education tends to conflict with this purpose, not only because of what it does but what it takes the child away from. When he is in adolescence and needs to be acquiring Amish attitudes of hard work and self appliance, if instead of being on the farm working with his father and developing these attitudes and skills he is in high school, he becomes attracted to intellectual pursuits and this is disfunctional as far as the avowed goal. I don't think it is sensible to assess an education without asking, "what is it leading to".

CROSS-EXAMINATION
BY MR. MARTINSON:

I have strong feelings on the subject. I have been a professor since 1962, and I went through elementary and high school and the University. * * * I dropped out of high school for four years, but apart from this, I persisted in my education. I know a little bit about what is entailed in coping with the world without a high school education. * * * I saw fit to get an education which qualified me for my present occupation because number one, I was not trained to be an Amishman, I was not preparing for other vocation in which that education would be necessary. I knew, as everyone

knows, the PhD. is necessary to a career as a professor. I happened to be interested in the professorship. I enjoy it and I prepared for it, and for that career that kind of education is necessary.

PARAPHRASED TESTIMONY FROM RESPONDENTS' APPENDIX IN THE COURT BELOW

TESTIMONY OF STATE

Cross Examination by Mr. Ball

KENNETH J. GLEWEN, School Administrator at New Glarus Public School District No. 1, for the State, testified:

The Amish opened their own elementary school around the middle of September. After this school opened I was in communication with the Amish. Thirty-seven Amish children who had been attending the public elementary school, in September, when the Amish school was put up, transferred to the Amish school. This resulted in a loss of State revenue to the New Glarus public school district in the vicinity of $18,000. I asked the parents of these children to hold off the transfer until the third Friday of September when we count our school population. The Amish parents refused to concede to my suggestion that they not transfer their children. I became aware of their refusal in the later part of August. I then brought the criminal complaint in the present action.

* * *

Pupils at New Glarus High School are expected and encouraged to become a part of the general life of the school and to form associations. We do encourage their social activities in that they get along with their peers. The school sponsors proms and similar things. The school,

in its curriculum, and generally, encourages the competitive spirit, for example, through sports. The school tries to teach values. We have a form of unity. We try to teach character values in sportmanship and values of good conduct, etc. Moral training is done in various ways, in conjunction with health, and also general science.

* * *

In connection with the teaching of fair play, loyalty to country, etc., we do not offer the Ten Commandments as a norm or standard to be followed. We do not have as such in our curriculum the Ten Commandments. Where a child would seek to know what ultimate norm lies behind a law, he would be referred to the school administrator.

* * *

Statement of State's Attorney

ROBERT D. MARTINSON, Deputy, Attorney General, State of Wisconsin, stated:

We have no objection to stipulating the defendants are sincere in their religious belief.

* * *

TESTIMONY OF APPELLANTS

Direct Examination by Mr. Ball

JOHN ANDREW HOSTETLER, professor, Temple University, Philadelphia, specialist on Amish society and religious beliefs of social groups:

The Old Order Amish constitute a religion. It has been in existence since 1693.

* * *

The Old Order Amish require a church-community that is separate from the world. The separation is part of their religion. The Scriptures tell them: "Do not conform to the world, do not be unequally yoked together with unbelievers." They also take a baptismal vow that imposes on them ethical obligations to God and man. Thirdly, they regard the rules of their church-community as binding on their members. Fourthly, the Amish religion closely relate to affinity to nature, the soil, the simple rural life.

The concept of separate from the world is part of the process of the saved community; you need the assistance of the saved brotherhood in order to get to the final destination which in the church and religion is heaven. This is why they come together as Amish: one cannot be a part of the unbelieving world, have the same values. The goals of the Amish culture with reference to children do contrast sharply with the values that are promoted in non-Amish society. And I think that if the Amish youth are required to attend the value system of the high school as we know it today, the church-community cannot last long, it will be destroyed.

[That] the Amish insist on retaining their own children is not based on stubborness but on their central religious belief, and if the Amish are forced to attend school against

the religion of the church-community, and to remain in the school teaching values contrary to their belief, great psychological harm can be done to the children. We have examples of this in various other groups in the United States. The studies have shown that when these children are placed in a setting where they have to choose between the ways of their parents—the values of their parents and a whole new set of conflicting values—many of the children end up in alienation.

The public school is really not equipped in curriculum and social environment to promote the values promoted in the Amish society.

The objection to education beyond the elementary grades seems to me grounded in the kind of informal learning that takes place in the Amish setting versus in the high school; and certainly the environment is very different in these two places. The public school breaks down the period of isolation that is needed for personality development, etc. in the culture of the Amish. That is to say, when the teenager arrives through the 8th grade he is forming his own friendships, he is given great responsibility in the Amish society, driving horses, working in the fields, which the suburban child is not getting. He is appreciated more in the home in arriving at the age of 16, so in a sense if put in the high school he is taking a backseat in his own culture in this particular area of his life.

In the Amish view the high school is higher learning, it is an effort toward wisdom which is wisdom not responsible to the community, so the world by the Amish is considered to be highly educated but plainly corrupt; it militates against the obedience to the community and religion.

The Amish would consider the high school even in their own culture as deterrent to a way of salvation, as an introduction of topics that are competing against the value system, against the religion in their own society.

It is part of the Amish parent's duty to teach his children the Amish way of life. An Amish man is morally obligated in the Scriptures to teach his children in the ways of God, and if he doesn't do this he is in danger not only of the censure of the church-community, which has specific rules against world education, but endangers his own salvation in sending the children into an eternal world which is believed to be ahead.

* * *

Cross Examination by Mr. Martinson

The central belief is the maintenance of the separate community once a person takes a vow of baptism—and they abide by this and it is a promise for life.

* * *

The Amish object to the environment of the public high school, in particular because of the kind of learning that goes on there. The Amish in their culture are used to learning by example—seeing older ones—while in the high school there is a great emphasis put on intellectual scientific topics. The emphasis in the Amish environment is to learn how one should live. There is in fact not much time for this in the high school with the teaching of sports and sciences and fun and self distinction, which is markedly different from

the environment to which the Amish belong. The theory is that of the children being exposed to worldly influences, to the pecuniary attitudes, the consumer aspect, which is quite different from their specific community. And in the setting of people of another faith.

The rules of the Amish church as such are simply the oral consensus of the community; this represents, I would say, the most substantial rule of evidence. There are church rules, but these are rarely put into print.

* * *

There is a great deal of difference in what education means, education for what. If it is so that the child can make his or her place in the world, it depends which world.

It is a myth to say that all education is good. Education must be tied to a culture that emotionally guides the child in the direction he knows he is going to live when he is an adult.

The baptismal vow is taken as an adult.

* * *

Redirect Examination by Mr. Ball

I did not mean to suggest when Mr. Martinson asked me about rules within the Amish community and whether they are in printed form, that there are no rules which the Amish regard as fully binding upon them.

Education means a discipline of character and intellect which will be an aid in living a useful life. A good education does not mean simply book learning or the acquiring of a great deal of information, or a scholar that has mastered

the many branches of learning that are taught in the schools or universities of today. It does mean, however, a store of practical knowledge and skill that can be diversed between that which is good and useful and noble, and that which is a good use in a way of learning the arts and sciences.

When, on cross examination by Mr. Martinson, I spoke of "two worlds", I meant that Amish education has as its basic goal the achieving of the other world, which is Heaven. An education which did not direct itself to that goal would not be education to the Amish.

Under a grant from the U.S. Office of Education, a study has been made of children of the Old Order Amish community. We wanted to know whether the pupils in it were being prepared for the kind of style of living which conformed also to the standards and goals of an adult world; we wanted to know whether these children are deprived; what their I.Q. was, so we gave them an achievement test in four or five different states. In general the I.Q. performance on a non-verbal test was above or equal to the norm of children in the public school, or normal Amish children. On the Myers-Briggs Type Indicator the Amish indicated a high sense of social awareness, and the category having the highest frequency of response came out with the personality description of this type: "quiet, friendly, responsible and conscientious. Works devotedly to meet his obligations and serve his friends and school. Thorough and painstaking, accurate with figures, but needs time to master technical subjects as reasoning is not his strong point. Loyal, considerate, concerned with how other people feel even when they are in the wrong." So we compared with the public school pupil achievements, and Amish pupils in their one-room schools have achieved very equal on these standardized tests.

* * *

Cross Examination by Mr. Martinson

REV. REUBEN HIRSCHBERGER, for Appellants:

The Amish religion does not forbid sending the children to the school through the 8th grade: the instruction the children get in those grades is not against the teachings of the Amish religion. When the children get to that age, we feel that someone else has to take hold, the farming or whatever the occupation is, and you got to get that religion in them just like when you plant a tree, you got to plant it straight or it always will be crooked. When a child reaches a certain age, normally that is when the child gets through 8th grade, is when you must begin to teach him the way of life of the Amish people. The reason why the Amish children do not go to high school is not so much what the high school teaches as the fact that they have arrived at the age they must be taught the Amish religion and the religious beliefs. Another reason is the temptations. We know we cannot get away from temptations but maybe we can avoid a few of them.

* * *

Redirect Examination by Mr. Ball

We definitely object to our children getting sex education in a high school.

* * *

WILBUR E. DEININGER, for Appellants, upon direct examination by Mr. Ball, testified:

Sheriff, 1963-1967; Undersheriff greater part of 1967 and 1968; now member of Department of Police, City of Monroe.

I am aware of the Old Order Amish in this county. To my knowledge no teenage members of this group have ever been apprehended or arrested in Green County for murder, burglary, armed robbery, arson, assault, possession of narcotics; vandalism, loitering, theft, reckless driving. I know of no Amish people of high school age who have been engaged in any violence. In my opinion the Amish people of Green County present no threat to the community.

* * *

Redirect Examination by Mr. Ball

I am quite sure we would know if an Amish person were involved in crime.

* * *

RAY F. KASKEY, for Appellants, upon direct examination by Mr. Ball, testified:

Director of Department of Social Services for Green County for nine years; engaged in social work for 25 years; familiar with social conditions in Green County.

No Amish people in Green County receive public assistance or are unemployed; no Amish have illegitimate births. I know of no Amish who are in publicly supported homes for the aged or who are beneficiaries of free county services for the indigent who are physically ill, mentally ill or alcoholics.

The Amish people in the county do not add to the social burdens which the taxpayers of Green County have to bear.

The fact that Amish children do not attend public or private full-time high school has no effect in adding to the social burdens carried by the taxpayers of Green County.

* * *

FRIEDA YODER, for Appellants, upon direct examination by Mr. Ball, testified:

Fifteen years old, daughter of Appellant Janet Yoder. Believes in the Amish religion. Wants to live according to the way of her people, the Amish way. Going to high school would be against her religious beliefs. The reason she is not going to high school is because of her religion, and that is the only reason.

* * *

DR. DONALD A. ERICKSON, University of Chicago, for Appellants, upon direct examination by Mr. Ball, testified as follows:

Associate Professor of Education, University of Chicago, Ph.D. in Education; conducted studies of Amish education; editor of various educational journals.

* * *

There is no such thing as non-education; every child is educated through the process of child socialization. The function of education is to prepare a child to lead some kind of adult life with some kind of independence and surety and competency. The Amish definitely provide for their children of high school age what could be called an education. I would be inclined to say they do a better job in this than most of the rest of us do.

* * *

If somebody doesn't want his child to have any formal education at all this is not what the Amish claim. This is not what the Amish stand for, they do not take a position like this, their claim for religious freedom in the various cases has not rested upon the prospect that the child not have any education at all. In that case one should argue that the welfare of the child becomes a part here, if he doesn't receive any formal education. Even as an Amish, if he received no education at all he would have trouble marketing and etc.

I would particularly refer to the study conducted by Robert Kollmorgan, he is now Professor Geography at the University of Kansas, but his conclusion was basically this, that if the functions of education for an Amish child is to prepare him to be an Amish farmer, or an Amish housewife, that indeed a high school education tends to conflict with this purpose, not only because of what it does but what it takes the child away from. When he is in adolescence and he needs to be acquiring Amish attitudes of hard work and self appliance, if instead of being on the farm working with his father and developing these attitudes and skills he is in the high school, he becomes attracted to intellectual pursuits and this is disfunctional as far as the avowed goal. And I don't think it is sensible to assess an education without asking, "what is it leading to".

As an educator and interested in the common welfare of the people of the United States, I think anybody should be allowed to head for the goal of agriculture. It is not repugnant to my views on the subject of education on the common welfare if someone suggested a person not go into book learning and on to the study of science, literature, art and so on.

* * *

The Amish are in a fortunate position respecting the schooling which they conduct for children beyond the eighth grade. It is learning by doing—an ideal system. We are learning that current education is detached from the real world and that in the things they talk about the pupils do not become involved or have real responsibility. The lack, in modern education, of a clear connection between learning and doing is responsible for much of the student actions that we have today.

* * *

Cross Examination by Mr. Martinson

The Compulsory School Attendance Law should not be applied to the Amish because if we force the Amish children into a regular high school we have no guarantee that they will respond to the program. I will go further. On the evidence of many social groups there is a very good probability that this will backfire; it can produce the kind of psychological problems Professor Hostetler spoke of, it will disrupt the Amish community, and the net impact will be negative.

In my opinion we should not supersede the religious belief of the parents unless we can demonstrate that the danger to the child is very clear. It is not altogether the

law which imposes this standardized system of education that we seem to have; much of it is imposed by the customs of educators. We have customary ways of doing things which tend to be written not only in laws but in courses in the universities, and I think that any optional group tends to crystalize on certain ways of performing. Both I and many other scholars feel that we have too soon crystalized our educational program. It was standardized on what is average in America with no consideration for the ethnic groups, the minority groups. When an education is fitted to the people, they will not move into society and perform with security and a sense of responsibility. They become public charges, fuel for revolt. This is most dramatic when it comes to ethnic groups; the malfunctions for the mainstream are not so apparent, they show up in terms of ulcers, the preoccupations that some manifest, the cutting down of diversity in the population, it is all much more subtle. It is harmful if we are all pressured to a single way of operating, if we cut down on the ethnic diversity in our society, if we have a city full of people who can't get jobs and can't perform.

The simple elementary school for the Amish performs a fairly important function, helping them in communication and to conduct marketing in the outside world. It fits them to deal with people on the higher education level to the extent that they need to. But we must recognize that Amish society is a society geared to the notion of a degree of isolation. These people aren't purporting to be learned people, and the self sufficiency of the Amish community is the best evidence I can point to: whatever is being done seems to function well.

* * *

FILED
JAN - 8, 1971
FRANKLIN W. CLARKE
Clerk of Supreme Court
Madison, Wisconsin

State Nos. 92, 93, & 94

August Term, 1970

STATE OF WISCONSIN IN SUPREME COURT

State No. 92
STATE OF WISCONSIN, Respondent,

vs.

JONAS YODER, Appellant.

State No. 93
STATE OF WISCONSIN, Respondent,

vs.

ADIN YUTZY, Appellant.

State No. 94
STATE OF WISCONSIN, Respondent,

vs.

WALLACE MILLER, Appellant.

APPEAL from a judgment of the circuit court for Green county: ARTHUR L. LUEBKE, Circuit Judge. *Reversed.*

The appellants Jonas Yoder, Adin Yutzy, members of the Old Order Amish religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church, were convicted in the county court of violating Wisconsin Compulsory School

Attendance Law (sec. 118.15, Stats.). Their children, Frieda Yoder, aged 15 years, Barbara Miller, 15, and Vernon Yutzy, 14, are graduates of the eighth grade of the New Glarus public school. The appellants refused to enroll them in the public high school for the fall 1968 school term as required by the compulsory school law,[1/] and were fined $5 each. The convictions were affirmed by the circuit court.

The appeal to this court and the defense in the lower courts involve the fathers' right to religious liberty and whether sec. 118.15, Stats., as applied to them violates the Free Exercise Clause of the First Amendment of the Constitution of the United States,[2/] made applicable to the states by the Fourteenth Amendment. The trial court held the compulsory school law did interfere with the freedom of the appellants to act in accordance with their sincere religious beliefs but concluded the statute represented "a reasonable constitutional exercise of a governmental function of the state."

HALLOWS, C.J. No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment. This appeal poses the question of whether the compulsory education law of this state, as applied to the Amish, infringes their religious liberty and, if so, whether such interference is constitutionally justified.

[1/] The pertinent provisions of that statute are:

"(1) Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

[2/] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

If the compulsory education law is to withstand the appellants' constitutional challenge, it must be either because the statute does not interfere with a constitutional freedom to act in accordance with their sincere religious beliefs or because the burden on the free exercise of appellants' religion is justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . " *NAACP v. Button* (1963), 371 U.S. 415, 438, 83 Sup. Ct. 328, 9 L. Ed. 2d 405. The determination of whether a law infringing religious liberty is justified requires the weighing of the burden on the free exercise of one's religion and the importance of the state's interest asserted in justification of the substantial infringement. *Sherbert v. Verner* (1963), 374 U.S. 398, 83 Sup. Ct. 1790, 10 L. Ed. 2d 965.

Is There Any Infringement
Of The Free Exercise Clause?

"The Amish as an independent sect were founded in 1693, near Erlenbach, Bern, Switzerland. Jakob Ammann, a Swiss Anabaptist and a follower of Menno Simons and the Mennonites, broke with his church in disagreement over what he felt were unwarranted departures from traditional practices. The Amish, the followers of Ammann, thus dedicated themselves to maintaining the old practices and resisting any capitulation to the sin of worldliness. . . .

"The Old Order Amish are the most conservative and traditional of the several branches of the sect, numbering about fifty thousand children and adults in the United States." *The Amish and Compulsory Education,* 53 Va. L. Rev. 925, 933.

The rules of conduct of the Amish religion in its folk culture context are incorporated in the Ordnung of each community but ordinarily are not articulated and codified in writing as some tenets in other theistic religions. Compliance with the Ordnung is enforced by sanctions of excommunication and shunning. *See* Hostetler, *Amish Society* (1963), p. 63; Yoder, *Caesar & The Meidung,* 23 Mennonite Qtrly. Rev. 76, 98 (1949). Many of the tenets of the religion are found in *The Confession of Dortricht* (1632)[3]/ discussed in *Commonwealth v. Beiler* (1951), 168 Pa. Super. 462, 79 Atl. 2d 134, 136. The lack of codification of the Amish tenets is of no concern. The Free Exercise Clause does not require the codification of religious tenets nor does this clause define the scope of religion. For its purpose, religion defines itself and binds the individual conscience.

At the trial the appellants put in evidence by expert testimony the full range of the Amish religous beliefs and the tenets of the Old Order Amish religion. Dr. John A. Hostetler[4]/ testified the Amish religion requires as a part of the individual's way of salvation a church community separate from the world. The Amish separateness is dictated by their religious belief of what God's will is for them and thus all the means by which they maintain this unique separateness have religious meaning.

3/ It is stated by Robert C. Casad in his article entitled *Compulsory Education and Individual Rights,* 5 Religion And The Public Order 55, the most basic tenet of the Amish religion of separation from the world relies on the Scripture, Romans [12:1], "Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good, and acceptable, and perfect, will of God," and II Corinthians 6:14, "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?" To the Amish, these beliefs "are not mere social philosophy: They are fundamental to the whole question of their existence on earth."

4/ Professor at Temple University; author of "Amish Life (1968)," "Amish Society (Revised Ed. 1968)."

The Old Order Amish religion dictates that the Amish child from the inception of adolescence live according to the mode of life in the Amish community; that he should not attend high school since any high school, public or private, constitutes a deterrent to his salvation. The period of adolescence is critical in the religious and cultural development of the child because at this time the child enters gradually into the fullness of Amish life, is given responsibilities which would be directly interfered with if he were compelled to go to high school, and accepts adult baptism. Thus, the Amish religion requires the avoidance of worldly educational environment and imposes the duty on the adolescent to become mature in a wisdom different from what others may regard as wisdom and in skills and responsibilities which are proper and fitting for a life different from what others may wish to pursue. To the Amish, how long a child should attend a formal school is a religious question.

This court does not evaluate, and in fact is prohibited from evaluating, a religious belief for ecclesiastical purposes. *Abington School Dist. v. Schempp* (1963), 374 U.S. 203, 83 Sup. Ct. 1560, 10 L. Ed. 2d 844; *Presbyterian Church v. Hull Church* (1969), 393 U.S. 440, 89 Sup. Ct. 601, 21 L. Ed. 658. Irrelevant, too, is this court's opinion, if it has one, of the validity, the reasonableness, or the merits of the Amish religious beliefs.

The state's argument that the appellants' refusal to obey the compulsory school law is no part of their worship but merely a practice or a way of life cannot be accepted. The Free Exercise Clause is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes the practice or the exercise of religion which is binding in conscience. *See Sherbert v. Verner, supra,*

and *In Re Jenison* (1963), 265 Minn. 96, 120 N.W. 2d 515; (1963) 375 U.S. 14, 84 Sup. Ct. 63, 11 L. Ed. 2d 39; (1963), 267 Minn. 136, 125 N.W. 2d 588. There is no question that, as found by the trial court, the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the First Amendment.

The Weighing of Conflicting Interests.

(A) The Burden on the Constitutional Right.

In balancing the competing factors to find the justification of the compulsory school law, we must first examine the burden caused by its interference with the free exercise of the appellants' religion. How heavy is the burden? We think it is clear the burden of compulsory education is a heavy one. The law commands the appellants to perform affirmative acts which are repugnant to their religion. To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into a homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child. The law also places a choice upon each of these fathers to either obey its commands and risk the loss of his salvation or to disobey the law and invite criminal sanctions. The sincerity of the appellants in their beliefs and in their religion cannot be questioned; such sincerity was stipulated in the record.

The impact on the Amish of compulsory education laws is so severe that in other states where they were required to send their children to public schools, they sold their farms and sought religious freedom elsewhere. Some of the Amish in Wisconsin were the victims of daily fines which became so

severe that they were suspended by the governor of Iowa and they sought religious freedom here, in a spirit and with a hope not unlike the Pilgrim Fathers who came to America. *See Clippings: Relation of religion to secular society: Separation of church and state: Church organization and membership,* Wis. Legislative Reference Library. When the Amish can no longer move, the impact may result in the extermination of their religious community.

There is another impact on the Amish children themselves if they are required to go to high school. They would experience a useless anguish of living in two worlds. Either the education they receive in the public school is irrelevant to their lives as members of the Old Order Amish or these secondary school values will make life as Amish impossible. At the trial, one of the children testified she did not want to go to high school. Since the children are not being sued as truants, we do not reach the question of whether they have an independent right of the free exercise of their religion to be protected here. We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates.

(B) *Compelling State Interest.*

On the other side of the scale we have compulsory education which in itself is not a compelling interest although it is within the state power to regulate. It is not sufficient for the state to show a regulation as a direct relation to a policy goal. A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation.

Compulsory education in the United States began in 1642[5]/ and in this state in 1889. The two Wisconsin cases[6]/ which have considered our compulsory school law add little to the issue because neither involves any claim of exemption based upon a religious right.

General interest in education was expressed in *Meyer v. Nebraska* (1923), 262 U.S. 390, 400, 43 Sup. Ct. 625, 67 L. Ed. 1042, when the court said, "The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted." In *Brown v. Bd. of Education* (1954), 347 U.S. 483, 493, 74 Sup. Ct. 686, 98 L. Ed. 873, the court noted that education was required in the performance of our public responsibilities and was the foundation of good citizenship; it was the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment.

The Amish point out that the education talked about in these cases is for a world which is not theirs; that their cultural values are different; that their life requires no professional training and that two years of high school education does not help Amish children to adjust normally to their Amish environment. The Amish claim, with compelling merit, that their education produces as good a product as two additional years' compulsory high school education does.[7]/

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[5]/ Note, *The Amish and Compulsory Education*, 53 Va. L. Rev. (1967), 925, 930.

[6]/ *State v. Freudenberg* (1917), 166 Wis. 35, 163 N.W. 184; *In Re Alley* (1921), 174 Wis. 85, 182 N.W. 360.

[7]/ Defense witness Wilbur E. Deininger, sheriff of Green county from 1963 to 1967, undersheriff in 1967 and 1968, and a present member of the city of Monroe department of police, testified that, to his knowledge, no teenage member of the Old Order Amish group dwelling in Green county had ever been apprehended or arrested for crime or engaged in acts of violence.

Defense witness Ray F. Kaskey, for the past nine years director of the department of social services for Green county, testified he knew of no Amish in the county who had been recipients of public assistance, had been unemployed or received unemployment compensation, had illegitimate births, been residents of publicly supported homes for the aged, the indigent, the physically or mentally ill, or alcoholics. He further stated the Amish people did not add to the social burdens which the taxpayers of Green county must bear, and that the fact the Amish children do not attend high school has no effect in adding to the social burdens carried by these taxpayers.

The state argues that in its capacity of *parens patriae* it can regulate children when it might be unreasonable to apply such restraints to adults. This is true but there are constitutional limitations on the doctrine of *parens patriae*. Here, the state has substituted its judgment of the type of education for the judgment of the natural parent and has made no allowance for the religion of the child or the religion of the parent. The doctrine of *parens patriae* as applied to juvenile-court procedure has recently received a set back in *In Re Gault* (1967), 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527, where a child's right to counsel was held supreme over the benign protection of the state.

In the important matter of freedom of religion, the natural parents should have the right to rear their children in their religion, especially as here, where the parents are in agreement and the tenets of their religion require them to render such upbringing. When a child reaches the age of judgment, he can choose for himself his religion, but prior to that time the state in its capacity of *parens patriae* ought not to enforce educational requirements which will directly influence or destroy that choice. Nor is this harm to the Amish justified because on speculation some Amish children may after reaching adulthood leave their religion. To force a worldly education on all Amish children, the majority of whom do not want or need it, in order to confer a dubious benefit on the few who might later reject their religion is not a compelling interest.

The state relies on *Prince v. Commonwealth of Massachusetts* (1944), 321 U.S. 158, 64 Sup. Ct. 438, 88 L. Ed. 645, for its justification to regulate the affairs of children. But *Prince*, while involving a child labor law, was more concerned with public safety. In *Prince*, the defendant (a

Jehovah Witness) was convicted of allowing a 9-year-old child to sell religious magazines on a public street corner in the evening. While a religious claim was asserted and a weighing analysis made, the court found the public interest was compelling. This holding is not persuasive in this sensitive area where each case must be evaluated on its facts. Since the same court does not decide all the cases, there is bound to be a difference of opinion.

Thus in *Sherbert v. Verner, supra,* the court held a Seventh Day Adventist could not be denied unemployment compensation benefits by South Carolina because she refused to work on Saturday, her Sabbath. The purpose underlying the denial of unemployment compensation was not a compelling reason and did not justify the placement of a substantial burden upon a religious right. The purpose of the denial, *i. e.*, not to foster indolence, was not defeated by a religious exception. Furthermore, the legislation required, as in the instant case, an act forbidden by religion. Thus, the court found a constitutional exception for Sabbatarians from the South Carolina law. In *People v. Woody* (1964), 61 Cal. 2d 716, 394 Pac. 2d 813, the California supreme court made an exception for the use of a narcotic, peyote, which was used by the Native American Church in its ritualistic worship. The court considered the small use for a religious purpose not to be subversive of the underlying purpose of the narcotic laws to protect public health and the impact of the restriction on religion to be great.

Sherbert requires us to ask whether an exemption of the compulsory education law for the Amish would defeat the purpose of compulsory education. We think not. If the purpose of the law is to enable one to perform his public duties, then

there is precedent for an exception. The court in *In Re Jenison* (1963), 265 Minn. 96, 120 N.W. 2d 515, (1963) 375 U.S. 14, 84 Sup. Ct. 63, 11 L. Ed. 2d 39, (1963) 267 Minn. 136, 125 N.W. 2d 588, on remand from the United States Supreme Court for reconsideration in the light of *Sherbert,* found an exception from jury service for a person whose religion would not allow her to judge others. Here, the public duty of jury service, like the instant case, required an affirmative act contrary to religious conscience. The court found no great impact on the jury system by an exception. The exemption recognizing the religious interest was an accommodation to effectuate the guarantee of the Free Exercise Clause.

Likewise, in the flag-salute cases, *West Va. State Bd. of Edu. v. Barnette* (1943), 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628, an exemption was found to a requirement to perform an affirmative act which was contrary to religious belief but in fulfillment of the duties of a citizen. As in the jury case, no catastrophy would result from the exemption, nor would any great harm result to the person involved or to others from the exemption. The impact of such an exemption was slight on the underlying purposes and objectives of the state regulation to foster good citizenship.

We recognize where harm from the granting of an exemption will result either to the person involved or to others, and where the act required, although against religious beliefs, is passive in nature, some courts have found the state's interest to be paramount or compelling. Generally, such acts have not interfered directly with acts of sacramental worship or seriously with the exercise of one's faith. Thus, vaccination was required in *Cude v. State* (1964), 237 Ark. 926, 377 S.W. 2d 816, and the blood transfusions in *Application of the President & Directors of Georgetown College, Inc.* (C.A. D.C., 1964), 331 Fed. 2d 1000, *cert.* den. 377 U.S. 978. But

to the contrary, see *In Re Estate of Brooks* (1965), 32 Ill. 2d 361, 205 N.E. 2d 435. It is not claimed by the Amish that the government cannot reasonably regulate some acts religiously motivated, but they point out that compulsory education in its affect on the Amish religion is far more harmful than the effects of vaccination or a blood transfusion was on religion.

We think it is even less possible to assert a spurious claim for exemption under this case than under *Sherbert*. Claims for such an exemption can easily be detected because of the uniqueness of the Amish people. Nor is there merit in the state's argument that its administrative expense and inconvenience of an exemption should be avoided. Here, the state is put to no expense by the exemption. True, Green county may lose a few dollars in state aid but this amount can hardly be the basis of a compelling state interest.

Granting an exception from compulsory education to the Amish will do no more to the ultimate goal of education than to dent the symmetry of the design of enforcement. The right to the free exercise of one's religion under the First Amendment should be accorded as much protection as the other First Amendment guarantees of Free Speech and Freedom of the Press. In those cases the nature of the right is accorded great weight against governmental regulation. The right to worship your God or to practice your religious beliefs are as important as the right to speak or print freely and may, to the individual involved, be more important.

Establishment Clause.

In granting the exemption in *Sherbert* to the Seventh Day Adventist, the court stated its decision was not fostering

the establishment of the Seventh Day Adventist religion in South Carolina but "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." This is the answer to the state's argument that to recognize an exemption for the Amish would violate the Establishment Clause. This case does not involve the Establishment Clause and the state misconceives the doctrines of neutrality and accommodation. Authorities now recognize the Free Exercise Clause and the Establishment Clause overlap, can conflict, and cannot always be squared on any strict theory of neutrality. *See Abington School Dist. v. Schempp, supra.* The "free exercise neutrality" may require a state to make special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulations.*/ This principle of neutrality is exemplified by the *Sherbert, Woody,* and *Jenison Cases.* As was recently said in *Walz v. Tax Commission* (1970), 397 U.S. 664, 668, at p. 669, 90 Sup. Ct. 1409, 25 L. Ed. 2d 697, which held tax exemption of religious property was constitutional:

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is

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*/ *See* Katz, *Freedom of Religion and State Neutrality,* 20 U. Chi. L. Rev. 426 (1953), and Religion and American Constitutions (1964); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich. L. Rev. 1031 (1963); Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation,* 1963 Religion and The Public Order 3, 29 (1964). *See* also *Braumfeld v. Brown* (1961), 366 U.S. 599, 608, 81 Sup. Ct. 1144, 6 L. Ed. 2d 563, where the court said that statutory exemption for Sabbatarians from Sunday closing laws would be permissible.

this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *See* also *Board of Education v. Allen* (1968), 392 U.S. 236, 88 Sup. Ct. 1923, 20 L. Ed. 2d 1060.

Other Cases Involving the Amish.

The three cases involving compulsory education and the Amish in other states have denied religious freedom but they are not controlling or persuasive. These are *State v. Hershberger* (1955), 103 Ohio App. 188, 144 N.E. 2d 693; *Commonwealth v. Beiler* (1951), 168 Pa. Super. 462, 79 Atl. 2d 134; and *State v. Garber* (1966), 197 Kan. 567, 419 Pac. 2d 896, *cert.* den. 389 U.S. 51, 88 Sup. Ct. 236, 17 L. Ed. 2d 50. Two of these cases, *Hershberger* and *Beiler*, were decided before *Sherbert* and rely heavily on the dubious distinction between religious belief and religious conduct. *See Cantwell v. Connecticutt* (1940), 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213. Thus the court in *Hershberger* reasoned that requiring the Amish to provide an education for their children would not abridge their right to worship, concluding therefrom that no question of infringement of religious freedom was involved. In light of *Sherbert*, the validity of such reasoning is to be doubted since the guarantee of free exercise of religion covers more than sacramental acts of worship.

In *Beiler* the court gave recognition to the conflict between compulsory education and religious liberty but having drawn the balance, proceeded to mechanically add to the state's side a series of cases upholding a restriction on religious conduct.[9]/ No analysis in those cases was made of the relative importance of the religious beliefs in issue or of the degree to which enforcement of the law infringed upon those beliefs. Nor did the court consider the effectiveness of the regulatory purpose or the practicability of an exemption. The type of an analysis used does not satisfy today's standards in dealing with constitutional questions. It is also significant that the *Beiler* decision has been modified by the Pennsylvania legislature.[10]/

In *State v. Garber*, the Kansas court considering the problem after Sherbert, held that the law was to be enforced against the Amish. The appellants' contention that *Garber* reflects an insensitive consideration of the Amish religion is in part supported by a reading of the opinion. *Garber* followed the *Beiler* court's mechanical separation of religious conduct from religious belief, implying that the constitutional protection is afforded only to beliefs connected to the act of worship and held that since the compulsory

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[9]/ *Reynolds v. United States* (1878), 98 U. S. 145, 25 L. Ed. 244 (polygamy); *Stansbury v. Marks* (1793), 2 Dall 213, 1 L. Ed. 353 (conviction of a person of the Jewish faith who refused to be judicially sworn on a Saturday); *Hamilton v. Regents* (1934), 293 U. S. 245, 55 Sup. Ct. 197, 79 L. Ed. 343 (military training at state university); and *Prince v. Com. of Mass., supra.*

[10]/ Note: 53 Va. L. Rev. (1967), 925, 951, describes the Pennsylvania plan which provides for the operation of day schools by church groups offering schoolwork programs to those fourteen and older who have completed the eighth grade. Each student spends no less than three hours a week in the "school" studying such subjects as English, mathematics, health and social studies, supplemented by outside agricultural and domestic projects. The note concludes "since perhaps the principle legitimate goal of compulsory education is to insure that children become useful and productive adults, and that they will not prove so dysfunctional as to become wards of the state," these "schools" ought to be as satisfactory as their trade school counterparts in urban communities.

attendance laws do not directly affect Amish worship, there was no abridgement of their religious freedom. But the Amish do not have a ritualistic form of worship. They have no churches as such. Their life style is dictated rather than motivated by their religion. The narrowness of the *Garber* concept of the scope of protection afforded by the Free Exercise Clause renders the case unpersuasive.

Garber has also lost luster because an exemption was provided in 1968 by the Kansas legislature. Kan. Stat. Annot., sec. 72-1111 (1968 Supp.). This exemption enables the Amish to comply with the Kansas law with its unique educational program. These legislative exemptions evince the fact the important goals of education can be attained by alternative forms of regulation without infringing first amendment rights.

We conclude that although education is a subject within the constitutional power of the state to regulate, there is not such a compelling state interest in two years' high school compulsory education as will justify the burden it places upon the appellants' free exercise of their religion. Therefore, the Wisconsin Compulsory School Attendance Law, sec. 118.15, Stats., is unconstitutional as applied to these Amish appellants, and the convictions must be reversed. If in the future the facts are such that the effectiveness of the compulsory education law will be seriously jeopardized by this exemption, we reserve the right to reexamine the question.

By the Court. — Judgments reversed.

State Nos. 92, 93, & 94

STATE OF WISCONSIN IN SUPREME COURT

State No. 92

State of Wisconsin,

Respondent,

v.

Jonas Yoder,

Appellant.

State No. 93

State of Wisconsin,

Respondent,

v.

Adin Yutzy,

Appellant.

State No. 94

State of Wisconsin,

Respondent,

v.

Wallace Miller,

Appellant.

HEFFERNAN, J. (dissenting) The principal opinion reaches an erroneous conclusion based upon questionable reasoning and a misstatement of the facts. Contrary to the implication of the opinion writer, the Amish were not prosecuted for failing to send their children to a public high school. They were prosecuted for violation of sec. 118.15 (1), Stats., which requires attendance at school, whether public or *private*, until the end of the school period in which the child attains sixteen years of age. The distinction is important and is crucial to this dissent. The principal opinion rests in part upon the misconception that the defendants' only alternative to criminality is *public* school attendance for their children. Such is not the case. The law makes no such requirement.

The reasoning is faulty, for it conceives the problem as one of religious liberty alone. It completely ignores the personal liberty of the Amish children to avail themselves of educational opportunities beyond eighth grade. In addition, the freedom of these young people to make a religious choice is completely ignored.

That opinion states:

> "Since the children are not being sued as truants, we do not reach the question of whether they have an independent right of the free exercise of *their* religion to be protected here. We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates." (Emphasis supplied.)

This, of course, is the easy way out. It keeps intact the opinion's oversimplification of the problem and avoids completely the difficult question of the court's responsibility to see that the legislative mandate of universal education is carried out. It purports to strike a blow for religious liberty; but in so doing, it does little for religion and impinges upon personal liberty.

The principal opinion solves the balancing of religious interests with equal ease. Having once set up the postulate that the free exercise of religion cannot be impinged upon by the state unless there is a compelling state interest in the regulation, the syllogism is completed by the unsupported assertion that "compulsory education . . . is not a compelling interest although it is within the state power to regulate."

That assertion is contrary to a reasonable view of accepted law. *Brown v. Board of Education* (1954), 347 U.S. 483, 74 Sup. Ct. 686, 98 L. Ed. 873, stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

What could be a more compelling state interest than "the most important function of state and local governments."

The very organic act that first set up a political structure for the territory that is now Wisconsin emphasized the compelling public interest in education. Article III, Northwest Ordinance 1787, provided:

> "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education should be forever encouraged." Wis. Stats. Anno., Vol. 1, p. 740.

Subsequent amendments to the Ordinance provided that the proceeds of public lands were to be used for seminaries of learning. The enabling act under which Congress authorized the organization of this state directed that section 16 of every township should be granted to the state for school purposes.

Education has been a prime and compelling interest of this state since its very beginning.

This, of course, does not completely answer the question of whether the compelling interest of the state should be paramount to the obviously sincere belief of the Amish elders that school attendance ought not be compelled beyond a grade-school level. On one hand we find a legislative mandate of unquestionable compelling state interest — that all children attend school until the age of sixteen — and, on the other, a constitutional mandate that there shall be no state law that prohibits the free exercise of religion.

A court ought not to make a choice favoring either the particular interest of church or state unless an irreconcilable conflict exists. Thomas Jefferson could not foresee that such conflicts could ever exist. He stated in his reply to an address of the Danbury Baptist Association in reference to the recently proposed freedom of religion amendment to the Constitution:

> "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." *Reynolds v. United States*, 98 U.S. 164.

While Jefferson's words express a hope rather than a realization, the lesson is clear: Conflicts between church and state, *i.e.*, between man's natural right of religious choice and his duty to his organized society, ought to be reconciled where possible, and judicial fiats declaring legislative enactments unconstitutional ought to be avoided except in the

clearest of cases and where all reasonable alternatives have been exhausted.

The principal opinion would also hold that the state has no compelling interest in a regulatory measure unless it has a "need to apply the regulation without exception to attain the purposes and objectives of the legislation." The argument, therefore, seems to be that to grant an exemption for such a small group as the Wisconsin Amish would have no effect upon the general policy of the state to further education, and the diminution of Amish children's education by two years is so insignificant as to be *de minimis.*

This argument misconceives the nature of the state's compelling interest in education. The purpose of education is not alone to provide a mass of educated, and hence, taxable citizens, but is, in addition, intended to educate the individual for life. The government's concern is not with enforcing a regulatory scheme. Rather, the concern is based upon the precepts stated in the Northwest Ordinance, *supra,* that religion, morality, good government, and happiness are all dependent upon education. This is the compelling government interest.

This difficult problem cannot be dismissed as *de minimis.*

The state's interest and obligation runs to each and every child in the state. In the context of the public law of the state, no child's education is below the concern of the law. The principal opinion bolsters the *de minimis* argument by making the unsupported tacit assumption that all or most of the Amish children will forever remain in their communities. This is not necessarily a fact. Large numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world.

Those young Amish who leave the group have received no education that equips them for modern American life. By not enforcing the school attendance law, the State of Wisconsin has consigned these young people to a future without any choice or goal except those of the traditional Amish life. They are abandoned without the intellectual tools to survive should they elect to leave the Amish way of life.

The traditional Amish life has its attractions, but ought this court, be depriving Amish children of all but a bare eighth grade education, block for all time all other avenues for them. This is the effect of this decision. On the basis of the religious beliefs of their parents, the Amish children are without a hearing[1] consigned to a life of ignorance—blissful as it may seem to the author of the principal opinion, who apparently views the Amish as "the noble savage," uncorrupted by the world. The reader is left with a picture of idyllic agrarianism. Unmentioned is the tragic side of Amish life: "Drinking . . . has become problematic" (Hostetler, *Amish Society*, p. 282); "Rowdyism and stress" (p. 281); "Preoccupation with filthy stories" (p. 282); "Drinking is common in all large Amish settlements" (p. 283); "It would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." It is highest among young men (p. 300). Amish society is perhaps but another microcosm of society—some of it is good and some bad. It is a cross-section of good and evil influences that pervade any society. But the children's denial of education ought not be justified on the mythological basis assumed by the principal opinion.

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[1] With our ostensible solicitude for the fate of children who are in other legal situations affected by conduct of their parents, it is surprising that no guardian ad litem was appointed to represent these children's interest. While the religious beliefs of the parents are at stake in this lawsuit, it is apparent that the children's interest is of equal importance. Reason dictates that representation by a guardian ad litem was a *sine qua non* of the majority's result.

The above descriptions apply to Amish society generally and are not specifically descriptive of the Amish community involved in this case. The source, Hostetler, *Amish Society,* is the one relied upon by the majority.

It is apparent, however, that the problem of having these "peculiar people"[2/] in our society ought not be solved by fining them or sending them to jail if they choose not to conform to the usual religious mores of the state. While the record in this case is incomplete, it reveals a complete lack of any attempt by local or state officials to deal realistically or imaginatively with a difficult problem. In fact, there is strong evidence that the purpose of this prosecution was not to further the compelling interest of the state in education, but rather the reprehensible objective, under the facts of this case, to force the Amish into the school only for the purpose of qualifying for augmented state aids.

The points of view, however, are clearly reconcilable. The law requires that all children attend school until they are sixteen. The Amish object to the worldiness of the usual high school. The writer of this dissent believes that both objections can be met by an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires.

In addition, such basic skills as English and mathematics should be taught—"unpretentious" knowledge that will be useful not only in the Amish community, but would better enable those who fall away from the community to adjust to the outside world and to continue their education if they so desire.

[2/] Deuteronomy, ch. 26, verse 18; Titus, ch. 2, verse 14.

Such plans have been adopted in Pennsylvania, Ohio, and Iowa, usually only after gestapo tactics by school authorities outraged the non-Amish community into reaching reasonable alternatives. In Iowa, only the intervention of Governor Harold Hughes brought rationality and compassion to a reconciliation of the problem. The Pennsylvania plan offers schoolwork programs to Amish fourteen years or older who have completed eighth grade. In addition to classwork in English, mathematics, and hygiene, they are required to develop domestic and agricultural skills. In Iowa, schooling is required, but Amish schools need not meet the public school curriculum standards. A similar practice is followed in Maryland. In Indiana, Amish are encouraged by the state superintendent of schools to organize their own schools.

Hostetler[1]/ points out that the enforcement of school attendance laws has resulted in the "professionalization" of Amish schools and that, as a consequence, nearly 200 Amish elementary schools and 50 Amish vocational schools (for post-fourteen-year-old students) were in operation in 1967. The plans recognize that Amish children will be better suited for the Amish way of life if they are educated to be productive members of the Amish community. They also recognize the state's interest in education that will serve the children if they leave the community.

1/ This discussion of these alternatives relies largely on Hostetler, *supra*, pp. 193-203.

The alternatives, therefore, are not those that are posed in the principal opinion. Compulsory education until age sixteen is not necessarily "worldly" education. No part of our law requires a student to go to a school not of his own religious choice. It merely requires that he go to a school. There is no reason why the Amish community should not establish its own school—as the Amish have in other states—that will foster the Amish way of life. They may not, however, ignore the compelling interest of the state in educating their children. They may do as other religious organizations have done and establish their own schools and teach them basic skills and the precepts of their own religious beliefs and be in conformance with the law. Until they do so, they are subject to criminal penalties.

Neither the prosecutorial tactics of the school authorities nor the insensitivity of the principal opinion to the educational policies of the state and the personal liberties of these children are appropriate to the problem faced by the Amish.

Contrary to the conclusions of the opinion subscribed to by the majority of the court and authored by Mr. Justice Connor T. Hansen, I am satisfied that the state's compelling interest in universal education has been abundantly demonstrated.

I would affirm, but would stay execution of sentence for such period of time as is reasonably required to properly organize and to commence operation of an Amish vocational school. At the commencement of such operations, the judgment should be vacated and the complaint dismissed.

State Nos. 92, 93 & 94

August Term, 1970

STATE OF WISCONSIN IN SUPREME COURT

State No. 92
STATE OF WISCONSIN,
Respondent,

v.

JONAS YODER,
Appellant.

State No. 93
STATE OF WISCONSIN,
Respondent,

v.

ADIN YUTZY,
Appellant.

State No. 94
STATE OF WISCONSIN,
Respondent,

v.

WALLACE MILLER,
Appellant.

CONNOR T. HANSEN, J. *(Concurring.)* I concur with the result reached in the opinion written by Mr. Chief Justice HALLOWS, but only to the extent that children of members of the Old Order Amish religion or Conservative Amish

Mennonite Church, living as members of the Amish community, should not be required to attend a school which meets the requirements of state law beyond the eighth grade.

Under the facts of this case, there has been an inadequate showing that the state's interest in establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion. Consequently, I would hold that unless and until further experience indicates that so invoking the First Amendment poses a serious threat to the effective functioning of an educational system within the state, children of members of the religious order involved in this case should not be required to attend school beyond the eighth grade.

I am authorized to state that Mr. Justices WILKIE, BEILFUSS, HANLEY and R. W. HANSEN, join in this concurring opinion.

MEMORANDUM DECISION BY COUNTY COURT
(Formal Parts Omitted)

Trial to the Court held April 2, 1969, Judge Roger L. Elmer, presiding.

Present in court were: Mr. L. A. Koenig, District Attorney for Green County, Mr. Robert D. Martinson, Deputy Attorney General of Wisconsin, and Max Ashwell, Attorney for the Wisconsin Department of Education; Defendants, Wallace Miller and Jonas Yoder, with their attorneys, Mr. William B. Ball and Mr. Thomas C. Eckerle. The appearance of Defendant, Adin Yutzy, was excused without objection under Section 957.07, Wisconsin Statutes, with authorization by him for representation by attorney.

It was agreed the cases should be tried and considered together.

Oral argument was had June 13, after receipt of briefs (except for one supplementary case discussion by letter by Defendants received with State's consent, June 23, 1969).

MOTIONS

At the opening of the trial, Defendants moved for dismissal of the complaints in all actions on the grounds of unconstitutionality of Wisconsin Compulsory School Attendance Laws.

The Court took the motion under advisement, reserving a ruling to be made after trial and arguments in the case.

Another motion was made during trial for Non-Suit, made by Defendants on the ground of the State's failure to prove mental and physical ability to go to school. A ruling on this was also reserved. It is the opinion of the Court that the evidence presented by the State, along with the permissible weight of circumstantial evidence, and the status of these facts as peculiarly within defendant's knowledge, did meet the required burden of proof. The motion is denied.

COMPLAINTS

Defendants were each charged as parents with failure to cause child to attend school regularly, contrary to Section 118.15 of the Wisconsin Statutes.

FACTS

It is found that the following were the facts, uncontroverted by Defendants.

At the times and places charged in the complaints, the named children were between the ages of 7 and 16 years; that they were not attending a high school, or vocational school, technical school, or private school, or any school. That each Defendant was a parent of one of the children, and each concurred in his child's non-attendance, and made the decision that such child should not attend school.

Wisconsin Statutes 118.15 (1) provides:

> "Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such children to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

Subsection 3 of the same Statutes excepts any child who is not in proper physical or mental condition to attend school, and any child exempted for good cause by the school board of his district of residence, and any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice is acceptable as proof that a child is unable to attend school.

The Court has experienced some concern about the specific provisions of certain of the Wisconsin school laws. Subsection (2) of Section 118.15 (aforesaid) provides for a different compulsory "high school" attendance age for some children (until the end of the school term, quarter or semester in which he becomes 18 years of age, unless, with proper approvals, he attends (after 16 years of age) the vocational, technical and adult education school in the district in lieu of high school). This applies to children residing in a school

district which also contains within its boundaries a vocational, technical and adult education school, offering day class programs. Thus different ages apply to compulsory attendance in different school districts.

Section 118.145 provides for determination of minimum standards for admission to high school, indicating the possibility of real potential dilemma.

However, no issue was raised in regard to these or other possible statutory ambiguities, nor was Subsection 2 above specifically applicable in the case, and the same will be no further considered.

CONSTITUTIONALITY OF WISCONSIN COMPULSORY SCHOOL ATTENDANCE LAWS AS TO DEFENDANTS

The principal issue on which Defendants base their defense is their contention of unconstitutionality of Wisconsin compusory school attendance laws as applied to Defendants as members of "Old Order Amish". As established by the evidence in these cases, Defendants have, as a substantial factor in their religious belief, a strong conviction that they cannot send their children to high school or any school of academic or secular learning after the children have completed the basic equivalent of an 8th grade education. They feel so strongly in this respect that they are convinced that not only do they jeopardize their own relationships with God, but also those of their children, if they permit such attendance.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment 1: Free Exercise of Religion

Amendment XIV: Due Process of Law

Wisconsin Constitution

Article I, Section 1: Inherent Rights of Man

Article I, Section 18: Freedom of Religion and Conscience

The provisions of both the Federal and State Constitutions provide for the protection of religious freedom.

The United States Constitution provides in the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Wisconsin Constitution, Article I, Section 18, states:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship, nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Both Constitutions contain also provisions as to the rights and liberties of any individual. The United States provides by the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law. Wisconsin declares (Art. I, Sec. 1) that all men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.

POSITION OF DEFENDANTS

Defendants contend that all the Defendants (parents), and each of the children named in the complaints, are members of the Old Order Amish religious society and/or sect; that the religious beliefs and practices of such sect are certain and matters of profound commitment, and include the religious duty, enjoined on parents by their religion, to rear their children in that faith; that they (Defendants) would be unable to carry out this duty by the application of Wisconsin compulsory school attendance laws to them.

They further contend that their children would be placed in a school providing an environment hostile to and conflicting with the Old Order Amish religion's way of life, and that they would be removed from their own religious environment which is central in their lives.

It is also their position that academic study itself is harmful if beyond 8th grade level, and refuse to consider establishing their own parochial or full-time private school.

The direct testimony of Professor John Hostettler at the hearing appears to describe the Old Order Amish society and religious beliefs with substantial clarity and inclusiveness. (Transcript of Trial, pages 45-55)

APPLICABLE LAW — RELEVANT PRIOR DECISIONS

The Federal Constitution is obviously controlling relative to the issue of religious freedom. *Cantwell et al. v. State of Connecticut,* 310 U. S. 296; 60 S. Ct. 900.

There appear to have been decisions by State appellate courts in cases containing similar issues, but no such case is found to have been determined by the Wisconsin Supreme Court.

The United States Supreme Court has not decided the specific questions involved here. There has been a large number of cases with various other claims involving the issue of religious freedom. Some of them are referred to.

FEDERAL DECISIONS

Prince v. Massachusetts, 321 U. S. 158; 64 S. Ct. 438 (1944), involved the affirmation of a Massachusetts conviction for the violation of the Massachusetts child labor laws by Mrs. Prince in permitting a child (girl, aged 9) to sell and distribute religious periodicals on the streets. The defendant claimed the prohibiting statute abridged her freedom of religion. The court acknowledged that the custody, care and nuture of a child resides first in the parents, whose primary function and freedom include preparation of their children for obligations the State cannot supply.

The freedom of parents to bring up the child in "the way he should go", teaching him the tenets and practices of their faith, and the freedom of the child to "preach the gospel" and by public distribution of "Watchtower" and "Consolation" in conformity with the scripture: "A little child shall lead them", were the liberties which Mrs. Prince claimed. (The little girl had offered testimony to show that she believed it her religious duty to perform this work, and failure would bring condemnation to everlasting destruction at Armageddon but the introduction of this testimony to the record was disallowed at the trials.)

The court pointed out that to make accommodation between one's freedoms and the exercise of state authority "always is delicate". It held that the family is not beyond regulation in the public interest as against a claim of religious liberty, and that neither the rights of religiously motivated acts nor the rights of parenthood are completely beyond limitations. Further, it was affirmed that matters which may be permissible for adults may not be so for children, even with their parents' presence. The interest of the State in the protection of health and safety are not nullified simply because it is challenged on the grounds of religious freedom.

Meyer v. State of Nebraska, (1923) 43 S. Ct. 625; 262 U.S. 390. Plaintiff in this case was convicted in Nebraska for, as a teacher in a parochial school, teaching the German language to a child of 10, contrary to a Nebraska law forbidding teaching any subject other than English to any pupil who had not attained and passed the eighth grade.

The U. S. court reversed the conviction, holding that the liberty protected by the 14th Amendment may not be interfered with by the State by arbitrary legislative action, or without reasonable relation to a purpose within its competency to act; that the determination by the Legislature of what constitutes a proper exercise of police power is not final or conclusive.

Pierce v. Society of Sisters of the Holy Names of Jesus & Mary, 45 S. Ct. 571, 268 U. S. 510.

This case established the principle that the State cannot compel a parent to send his child to public school.

The State of Oregon's compulsory school act of 1922 required all normal children between ages of 8 and 16 to attend public school. The court held it to be in violation of the Constitution (14th Amendment) because it deprived parents and children of their rights in the selection of schools.

However, the court indicated no question to have been raised as to the power of the State to regulate all schools, supervise and inspect them, to require all children of proper age to attend some school, to require that certain studies plainly essential to good citizenship must be taught, etc.

West Virginia State Board of Education v. Barnette, 63 S. Ct. 1178, 319 U. S. 624 (1943).

In a previous case, *Minersville School District v. Gobitis,* 60 S. Ct. 1010, 310 U. S. 586, 127 ALR 1493 (1940) the court had "assumed" that the State had power to impose the "flag salute discipline" on all children in general.

But the *Barnette* case re-examines its assumption, discussing it with Lincoln's statement of the dilemma, (63 S. Ct. at page 1184)

> "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"

The court determined that the compulsory salute enforcement should be enjoined.

Involved were requests for injunctions against the School Board applying the requirement for the flag salute against Jehovah's Witnesses. The Witnesses, an incorporated body, whose teaching that the obligation imposed by the law of God is superior to that of the laws enacted by temporal government, includes a literal interpretation of Exodus, Chapter 20,

verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them or serve them." The flag is considered an image under this command and for this reason they refused to salute it. (See 63 S. Ct., page 1181.)

The court recognized that the symbolism of the flag could include many things to different individuals; symbols of salute often convey political ideas just as religious symbols such as the Cross, the Crucifix, the altar and shrine or clerical raiment convey theological ones. And associated with many of the symbols are appropriate gestures of acceptance or respect, whether a salute, a bowed or bared head, a bended knee.

The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of the political controversy.

However, though enjoining the salute, the court reaffirmed the statement of the right of the State to:

> "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." (63 S. Ct., page 1182)

(The court also refers in Footnote 13 page 1183 to an interesting comparative situation:

> "Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. . . ." 21 Encyclopaedia Britannica, 14th Ed. 911, 912.)

Sherbert v. Werner, 83 S. Ct. 1790, 374 U. S. 398 (1963), In this case a Seventh Day Adventist had asked for unemployment compensation but had been denied it by South Carolina. Denial was based on her failure to accept available employment which included the requirement of Saturday work. She contended that her religion forbade her to work on Saturday. The South Carolina Supreme Court held that such denial was not a violation of her religious rights.

The United States Supreme Court reversed, holding that the denial of the unemployment benefits restricted her free rights of religion.

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " Brief of Defendants, page 9.

School District of Abington Township v. Schempp, 83 A. S. Ct. 1560, 374 U. S. 203 (1963).

This case involved a requirement by Pennsylvania of the reading of at least 10 verses of the Holy Bible, without comment, at the opening of each public school on each school day. Any child could be excused from attending such reading, or participating therein, on written request of his parent or guardian.

This case involved the "Establishment" clause of the constitution. The court held that the State, in the relationship between man and religion, is firmly committed to a position of neutrality.

Murdoch v. Commonwealth of Pennsylvania, 63 S. Ct. 870; 319 U. S. 105.

Here the court held that spreading one's religious views through distribution of literature, door to door, and playing a phonograph record expounding their views was an exercise of religious freedom rather than a commercial venture, and a city ordinance providing that canvassing required a license was unconstitutional to defendants (Jehovah's Witnesses).

Reynolds v. United States, 98 U. S. 145, and *Davis v. Beason*, 133 U. S. 333, 10 S. Ct. 299, are cited in the above case relative to the polygamy and bigamy holdings, one of the areas of illegal conduct under claim of religious freedom which has been definitely disavowed.

Defendants also refer to other Federal cases involving the use of L. S. D., poisonous snakes. (Defendants' Brief, page 26)

STATE DECISIONS

The State (Prosecution) cites, as a very parallel case, *Kansas v. LeRoy Garber*, 197 Kan. 567, 419 Pac. 896, 2d Series.

Defendant, Mr. Garber, was found guilty of violating the compulsory school attendance law of Kansas. His daughter did not attend any school wherein school consisted of 4 weeks of 5 days and of 6 hours per day, as required. The case was submitted on a stipulation of facts. Included where these facts: Defendant was a member of the Old Order Amish Mennonite Church. His daughter, under defendant's control and of the compulsory school age was not enrolled in any public school in her district. She was enrolled in an approved correspondence school of home study (vocational culture school).

In 1965, the Amish community in Reno County, Kansas, established a school for its children known as the Harmony School. Its pupils were limited to those who had finished eighth grade but under 16 years of age. It was taught by an Amish farmer whose formal education had consisted of 8 grades in public schools. Formal classes were held in Harmony School one morning each week. On each of the remaining four days students spent one hour in study at home and five hours in vocational home training, generally in farming. All instruction was given in English except a German reading course in which the German Bible was used.

Defendant's daughter enrolled in Harmony School after notice of truancy was served on defendant.

The agreed statement of facts also contained a history of the Amish people and a recital of their religious tenets and practices. Many of the stipulated facts were very similar to the proof submitted at the trial in our case.

The court upheld conviction of defendant, holding that neither the correspondence school nor Harmony school constituted a private, denominational or parochial school. Among other things, it did not meet the days and hours in school requirement. Here too, the defendant argued infringement on religious freedom. However, the Kansas Court held that religious freedom does not place the parent beyond regulation by the State in its providing and requiring education for the public interest as against a claim of religious liberty.

In *Commonwealth v. Beiler,* 168 Pa. Super. 462, 79 A. 2d 134, there was affirmed a conviction under the Pennsylvania compultory school law. In this case, too, the court accepted as true definitions of faith the Amish prohibitions against having their children attend high school. Nevertheless, it was held that parents have no constitutional right to deprive

their children of education or to prevent the State from assuring children adequate preparation for independent, intelligent exercise of their privileges and obligations as citizens in free democracy.

In *People of the State of Illinois v. Marjorie Levison, et al.*, 404 Ill. 574, 90 N. E. 2d 213, although involving different precepts, Illinois stated that:

> "No parent can be said to have a right to deprive his child of educational advantages at least commensurate with the standards prescribed for public schools, and failure to provide such benefits is a matter of great concern to the courts."

The Illinois Court approved, in effect, home education by private home instruction by the parents in this case. The father was a college graduate and minister; the mother had two years of college and some training in educational psychology. Regular school hours and subjects were observed in the home teaching.

State v. Hershberger, (Ohio, 1955) 144 N. E. 2d 693.

Defendant, a member of Old Order Amish Mennonite Church, sent his children to a private school established by members of his faith. This school was held in a one-room frame building, taught by a teacher with less than an 8th grade education.

The school involved was held not to qualify. A private school must provide instruction equivalent to that of public school. It was held that no question of religious freedom was presented in the case; to require defendant to provide for the proper education of his children did not abridge his right to worship according to his conscience. His right to instruct his children in his chosen faith was not questioned.

Dealing in another area of parental constitutional rights of worship, the case of *State of New Jersey v. Perricone*, 37 N. J. 463, 181 A. 2d 751 (1962) the New Jersey Court held that the compelling needs of an infant, child of parents who were Jehovah's Witnesses, for a blood transfusion which by their faith they strongly opposed, were paramount.

CONCLUSIONS

It serves no purpose to comment extensively on the historical patterns of problems of persecution which have traditionally beset minority groups, whether minority religious faiths or other minorities.

Man's lack of empathy and perspective, with its resultant self-righteous intolerances and repressions directed toward minority religions have not added lustre to his composite human stature.

One of the principal motivations of the early settlers of our nation was their search for escape from the religious persecution of their various prior environments.

The framers of our Constitutions determined that Church and State must be separate, that man must be absolutely free to believe as his conscience might direct him, and free to act in accordance with his beliefs, so long as he did not interfere with the rights of others or create a real danger to society.

The State should know no heresy. It should condone no New Salem Witch trials.

Our courts have recognized the threats to the freedom of the individual by the expressions of convictions of the power of majority groups whose power has been generated by their strength of numbers.

The area, and that which is involved in our case, of close questions of conflicts between the individual's constitutional religious freedom and personal rights, when they are in conflict with the rights of the State to carry out its normally proper and reasonable governmental functions and police powers, presents unique difficulties, and problems of narrowly separated degrees. The Federal Court has emphasized its recognition of the grave responsibility when it must reconcile these conflicts. The "judicial conscience" is put to its severest test. Every possible "leeway" should be given to the claims of religious faith. (See Footnotes, 18, 16 *Am. Jur. 2d*, page 655)

However,

> "The freedom of religion which is guaranteed by Federal and State constitutions is not an unlimited freedom. To affirm that the freedom to follow conscience has no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration." (Supra)

Defendants are sincere in their religious convictions. They feel that any education of a secular nature, past eighth grade, absolutely obstructs their compliance with the commands of God and destroys their communal family life. The nature of their basic society and pattern of life is interwoven with what they believe is their compelling obligation to preclude their children from substantial exposure to non-Amish ways and thinking. The basic elementary education which they accept is adequate (perhaps marginally) for their required needs in their methods of farming or carpentry. (See testimony of Professor Donald Erickson, Record, pages 94-117.)

Professor Erickson, a professional student of education, indicated strong convictions that our educational system is

too standardized; that no school of which he is aware is culturally and religiously neutral; that the uniformity of school patterns is aimed at equipping a child to function in a stereotyped pattern; that one single system of education imposed upon everybody is "disastrous" and "harmful to the general welfare"; that the education furnished by the Amish is beneficial to their children and consistent with the maintenance of a solid culture, a whole and complete way of life; that the success of this system is verified by the excellent functioning of the Amish community, its freedom from crime, delinquency, public assistance and general symptoms of social failure.

The Amish are, of course, legally free to create their own parochial high schools just as other religious groups have done, if they will comply with minimum academic educational standards.

Apparently they refuse, in accordance with their belief, to do this, even though their children could thus retain their "isolation" and would not be forced to receive their education in an environment of "unbelievers". The consequent separation of their children from their home environment and deprivation of training by parental observation, along with their objection to academic learning, leads them to refuse this alternative.

And, as all other persons and religions, the Amish are in no way prevented by law from providing as much religious training in the home or in their community as they find proper.

It is understandable that the Amish, just as any other group, hope to retain their children in their religion, and to avoid, as much as possible, exposure to non-conforming influences which might be negatively influential to their steadfastness.

This is obviously one of the motivations of other religious groups in creating their parochial and private schools, by which they can control a substantial part of their childrens' influential environment, as well as their teachings, during their formative years.

The members of every religious group have the right to use all reasonable affirmative motivations of which they can avail themselves in their goal of keeping their children steadfast in their own faiths.

It is also understandable that the Amish, with their culture, are concerned with their disappointments with the "world".

But surely many concerned parents of many faiths and convictions express alarm at many of the exposures offered by today's environment to its youth. The high odds of exposure to primitive, jungle type of savagery on the streets of many of our metropolitan areas, simply as a result of being there, appear to cause apprehension for many parents who make observations from hearing or reading the news media.

The commentaries of many of our nation's observers, decrying the emphasis on what to many appears to be an environment singularly satiated with pornography for profit, aggressively promoted by those who gain with apparent confidence of freedom from any circumscription, books whose covers are blatantly designed to shout attention to the extremities of concupiscent promise enfolded within; movies considered by some of their seasoned evaluators to be competitively and cynically engineered toward qualification for their Adult ratings; emphasis of the appeal to the Hedonistic in many forms of commercial advertising, these and other stimuli with which children are confronted in their introduction to what to many appear to have become the new norms, whether

or not these children are of sufficient maturity to have achieved their own perspective, these can give grief to parents and to non-parents.

Nevertheless, the concomitant issue, which cannot be separated from the measure of the rights of the Amish parents, is the equated effect of the exercise of their rights on to the rights of these same children. They are not only their children but also individuals congenitally entitled to their own freedom, each in his own right, each born under the protection of the same constitutional promises.

Does the right to affirmative teaching and guidance carry with it directly or by implication the right to the free and unlimited utilization of the negative methods of denial of the right to acquire acquaintance with other areas of learning? Does each youth possess the "equal" right to search for his personal determination of his own convictions with the benefit of the perspective gained from the comparisons and contrasts intrinsic in academic learning?

This privilege has been considered by our society to be a basic right of all of its children, and the compulsory school laws are the means of articulation of that right.

The record does not substantiate that substantially all children from the Amish groups determine to remain in that culture.

It does appear from the record that an appreciable number of Amish-reared youth may decide to subsequently adopt a different faith, join a different church, or leave the Amish community to become a part of a different culture. They then must compete with those who have had a high school education.

Do these individuals not have the right to have at least the degree of educational preparation offered by high school, in

case they may decide to become veterinarians, physicians, sailors, "specialty" farmers, heavy equipment operators, yes, perhaps a college professor or professional expert in education and anthropology, authors?

The record in this case does not contain extensive testimony on this point. However, Professor Hostetler, a defense witness, in discussing Old Order Amish population on cross-examination, said:

Q This goes back to the Old-Order Amish, do your studies indicate whether the Old-Order Amish population is the same as it was fifty years ago, or more or less?

A Two things on that, the population is much more than it was fifty years ago, there is a gradual increase, but at the same time the Amish have also lost members in their church through the years, and I would say of the total migration to the country, probably two-thirds have been assimilated non-Amish people today.

Q So the Amish religious membership is not known?

A No, it is non-static.

Q Specifically, I take it, it is not true that once a member of the Amish always a member of the Amish, not in all cases anyway?

A Since the baptismal vow is taken as an adult it is always a problem that one might choose not to be an Amish when you reach that age, yes.

(Trial Record, pages 68 and 69)

It is not the wish of this court to maximize the distinction between Amish parents and Amish youth. Both are members of the Amish Community and many of the youth will become Amish parents. Nor does it wish to overemphasize the negative arguments relative to the contentions of the Amish

parents. And the court is not unaware of what, to some, may seem the clouded and perhaps anomalous shadows of similarity in some aspects of this conflict of rights and the conflicts of rights partially causative of the environmental factors of general parental concern previously alluded to in this opinion.

This extended opinion is the attempt, within the limitations of its writer, at an expression of their recognition in the attempt toward reconciliation of the complexity of factors, pressing in opposing directions the essential search for a just determination of the questions which have been presented to this court.

And the court is further confronted by another admonition of our law. It is an established and long-standing rule of our law that the exercise of the power to declare legislation unconstitutional by trial courts (courts inferior to the Appellate Court) "should be carefully limited and avoided if possible." *State v. Stehlek*, 262 Wis. 642, 56 N. W. (2) 514.

> "The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction. That is especially true where, as in this case, the statute has been in effect for nearly eight years, and has been enforced in innumerable cases." Ibid, pages 645, 646. (But see dissent in *Prince v. Mass.* Ibid.)

In *In re City of Beloit*, 37 Wis. 2d 637, 155 N. W. (2) 633, the court said, at page 643:

> ". . . and (2) if a statute is open to more than one reasonable construction the construction which will accomplish the legislative purpose and avoid unconstitutionality must be adopted."

The Court finds that the Wisconsin compulsory school law does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief, but also concludes that the statute in issue represents a reasonable and constitutional exercise of the governmental function of the State.

The Court would be inclined to find unconstitutionality of such statute if its requirements to attend school effected and concerned only adult members of the Old Order Amish. However, in view of the innate conflict with the rights of the Amish youth whose attendance it does require, as well as the basic interest and duty of the State in regard to the education of its children, it does not find the statute unconstitutional in its application to Defendants.

The Defendants' motion to dismiss the charges as involving an unconstitutional statute is denied.

The Defendants, each of them, is found guilty as charged.

PENALTY

No one involved in this proceeding has questioned the sincerity of the Defendants in their conviction that they were violating no constitutional law.

No one has questioned the exceptional morality of these Defendants as Amish people, their history in relation to their admirable record of lawful conduct in areas other than school laws.

The prosecution has not taken a vindictive approach; it has not indicated that it wishes to treat Defendants in the usual sense as alleged "criminals". On the contrary, it has shown great respect for the Defendants, their society and their sincerity of belief.

However, it is one of the realities of the law here involved that to enforce what the Legislature has determined to be a proper statute for carrying out its duties to all Wisconsin youth it has logically found it necessary to determine non-compliance to be a misdemeanor and provide for a penalty in conviction thereof.

Regrettully, this court feels that, in order to fulfill its function, under the circumstances it must impose at least a symbolic penalty upon this conviction.

It is the Judgment of the Court that the Defendants, each of them, is fined the sum of $5.00. Costs shall be waived.

DATED: August 15, 1969.

BY THE COURT:

Roger L. Elmer
Roger L. Elmer
Green County Judge

ADDENDA

The Court wishes to express its appreciation and commendation to all counsel involved, both those for the State and those for the Defendants, for the laudable and professional approach taken to the case, its trial and argument, and all proceedings herein.

MEMORANDUM DECISION BY CIRCUIT COURT
(Formal Parts Omitted)

Hearing upon appeal for trial de novo to the Circuit Court from the judgment of the County Court of Green County, pursuant to Section 958.075, Wis. Stats., heard at the Courthouse

in the City of Monroe, and submitted upon the stipulated record made in County Court, together with the original briefs and additional argument of counsel in all three cases as consolidated for trial.

Present and Presiding:

Hon. Arthur L. Luebke, Circuit Judge;

Appearances:

Mr. Louis Koenig, District Attorney for Green County on behalf of the State of Wisconsin;

Mr. Max Ashwell, of Madison, Wisconsin, attorney for the Wisconsin Department of Education, of counsel for the State of Wisconsin;

Mr. William B. Ball, of Harrisburg, Pa., on behalf of the defendant;

Mr. Thomas C. Eckerle, of Madison, Wisconsin, of counsel for defendants.

BY THE COURT:

The three defendants are each charged as parents with failure to cause the child of each to attend school regularly in violation of Section 118.15(1), Wis. Stats., which provides:

> "Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

It is undisputed or reasonably inferred from the record that the children involved were between the ages of 7 and 16 years and were not attending a high school, vocational school, technical school, private school, or any other school; that each parent concurred in his child's non-attendance and actually made a decision that such child should not attend school; that the children were in proper physical and mental condition to attend school; that none had been exempted for good cause by the district school board; and that none had completed the full four year high school course, or was otherwise excepted from attendance by statute.

The defendants contend the Wisconsin compulsory school attendance law is unconstitutional as applied to bona fide members of the Old Order Amish religious society, inasmuch as it is a substantial factor of their religious belief that they cannot send their children to high school or any school of academic or secular learning after the children have completed the basic equivalent of an 8th grade education. The record establishes that this sect feels so strongly in this respect that they are convinced that not only do they jeopardize their own relationship with God, but also those of their children, if they permit such attendance.

Defendants further contend that they would violate their religious duty by placing their children in school beyond the 8th grade level in an atmosphere inevitably hostile to and conflicting with the Old Order Amish religion's way of life, and that they would be removed for many hours each school day from their own religious environment which is so central to their lives.

Adding immensely to the difficulty and increasing the seriousness of this confrontation between such and state is the

fact that the sect believes that education is harmful beyond the 8th grade level and they flatly refuse to establish their own parochial or full-time private school staffed and administered by members of their own faith as other religious groups have been willing to do so as to better indoctrinate their children and shield them from some of the harmful influences of a public school education.

In challenging the constitutionality of Wisconsin's compulsory school attendance laws, defendants rely upon both the United States and Wisconsin Constitutions.

The United States Constitution provides in its 1st and 14th Amendments, respectively, in part, as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Wisconsin Constitution provides in Article I, Sections 1 and 18 respectively, in part, as follows:

"All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness . . ."

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship . . ."

The Green County Court in upholding the constitutionality of the Wisconsin compulsory school attendance law carefully reviewed the Federal and State decisions touching upon the infinitely delicate and conflicting constitutional right of religious freedom as opposed to the right of the State to carry out reasonable governmental functions and police powers designed to educate its youth sufficiently to exercise the benefits and responsibilities of citizenship in a republic, and to enjoy some degree of equality of opportunity in later searching for a livelihood in an increasingly technical and complex society where the uneducated face exploitation and governing hardships.

The essence of the defendants' argument is that in view of their demonstrated ability to exist successfully as law-abiding, self-supporting, and self-educating (beyond the 8th grade) citizens, their religious convictions with respect to the evils of any kind of a high school education (which is a corner-stone of their faith) should be protected and are safeguarded under the Constitution. In short, they contend that their religious belief in this respect does not amount to a grave abuse of the law endangering a paramount interest of the State sufficient for the State to have constitutional permission to limit such a religious belief by compelling the school attendance of their children beyond the 8th grade. This appears to be the real test.

For the same reasons enumerated by the County Court in its earlier decision, the Circuit Court agrees that the Wisconsin compulsory school law does interfere with the freedom of the defendants to act in accordance with their sincere religious beliefs. This Court is also acutely aware of the fact that the Old Order Amish is a sect admired and respected by

all who know them for their integrity, rugged self-reliance, high moral character, and ability to support and care for their brothers, while living and practicing the simple life without the "benefit" of a formal high school or higher education, all in accordance with the dictates of their religious beliefs.

Nevertheless, without repeating the case authorities cited by the County Court, this Circuit Court also is obliged to conclude that the compulsory school statute still represents a reasonable and constitutional exercise of the governmental function of the state. Some of the more basic considerations involved in such a decision are briefly enumerated, as follows:

(1) The law does not compel the parent to send his child to a public school. The Amish are legally free to create their own parochial high schools just as other religious groups have done, if they comply with minimum academic educational standards. Education per se need not be evil or corrupting. Private schools and parochial schools have been traditionally established in our country when education by the state or government has not been satisfactory or trusted by certain groups.

(2) The record clearly shows that a substantial number of Amish children leave the faith of their fathers when they become emancipated. The State owes a duty to a child to insure and protect his basic rights so that when he reaches the age of emancipation he will not have been deprived of a reasonable degree of education that he would have desired had he had the freedom of choice that an 8th grader cannot exercise.

(3) Although there was testimony introduced that the Old Order Amish believe that any education beyond 8th grade is and must be of a corrupting nature and contrary to the will of

God, there was actually no documentary evidence introduced to explain how and when this practice became an article of faith, and whether this is really doctrine or merely a generally recognized practice. Most religions rely on an inspired book or testament, or at least an official quotation or pronouncement by some supreme authority to distinguish what is binding doctrine from what is merely generally observed custom or church administrative rulings. Obviously in the long history of this sect it existed in areas where and when there was no such thing as an 8th grade or even school systems of any kind. Just how the 8th grade cut off point was arrived at was not explained. Age apparently was not the test, nor was the quality of the school system apparently a factor. The defendants had the burden of establishing what was an article of religious faith as distinguished from what is merely a general custom or desirable practice which is capable of various interpretations in various parts of the world by the same believers. The opinions of a minister or a church historian, while being certainly opinions of experts, are not conclusive upon the Court even when unrebutted, particularly when they leave unanswered other relevant questions. It is a well established rule of law that the weight of expert opinion evidence is for the trier of fact.

Accordingly, it is the conclusion of this Court that each of the three defendants is adjudged guilty as charged beyond a reasonable doubt and should appear in Court on the 25th day of November at 9:30 A. M. for sentencing and for the formal proceedings necessarily related to conviction, including the opportunity to make statements by way of mitigation since this is a trial de novo, unless counsel can agree to some other arrangement as a matter of convenience.

Dated this 13th day of November, 1969.

Arthur L. Luebke

Arthur L. Luebke

Circuit Judge

AMENDED MEMORANDUM DECISION

IT IS HEREBY the further order of the Court that the last paragraph of its Memorandum Decision, dated November 13, 1969, be amended insofar as it provides for any further sentencing. The Court is satisfied upon further consideration that in affirming the convictions of the Green County Court, the sentence of said Court is also automatically affirmed. In any event, it would be the intention of the Court to impose the same fine and costs as were originally imposed by the County Court. Therefore it is unnecessary for counsel and the defendants to appear for sentencing. The convictions and sentencing of the County Court are hereby affirmed.

It is further ordered that all Circuit Court papers now filed in connection with this appeal shall be retained by the Clerk of Circuit Court in said file and need not be returned to the County Court. This Judge has been advised by counsel for all the parties that this Amended Memorandum Decision meets with their approval and is sufficient to dispose of the case and will suffice for their needs in event of any appeal.

Dated this 15th day of December, 1969.

Arthur L. Luebke

Judge

SECOND AMENDED MEMORANDUM DECISION AND ORDER
(Formal Parts Omitted)

IT IS HEREBY the further order of the Court that its Memorandum Decision, dated November 13, 1969 and December 16, 1969, be amended insofar as they hold that this was a trial de novo. The Court is satisfied upon further consideration that this appeal was governed by Chapter 125 of the Laws of 1969. Said orders are therefore deemed to be in complete accordance with the provisions of said chapter.

Dated this 26th day of December, 1969.

Arthur L. Luebke
Judge

70-110

FILED
APR 2 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. [redacted]

STATE OF WISCONSIN, *Petitioner*,

v.

JONAS YODER, *Respondent*.

STATE OF WISCONSIN, *Petitioner*,

v.

ADIN YUTZY, *Respondent*.

STATE OF WISCONSIN, *Petitioner*,

v.

WALLACE MILLER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

ROBERT W. WARREN
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JOHN W. CALHOUN
Assistant Attorney General

Department of Justice
State Capitol - Room 114 East
Madison, Wisconsin 53702

March 30, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The petitioner State of Wisconsin respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin made in this proceeding on January 8, 1971.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin appears in 49 Wis. 2d 430, 182 N.W. (2d) 539 (1970) and in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was made on January 8, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3) in that the validity of a state statute is drawn into question as being repugnant to the free exercise of religion as guaranteed by the First Amendment of the United States Constitution.

QUESTIONS ON PETITION FOR CERTIORARI - AMISH CASE

(1) Is Wisconsin's compulsory school attendance law, in particular secs. 118.15 (1) (a) and 118.15 (5), Wis. Stats., 1969, constitutional despite respondents claim that attendance of their children in any school beyond eighth grade would be a violation of respondents' right to worship freely as guaranteed to them by the First Amendment to the United States Constitution?

(2) Does the ruling of the majority opinion of the Wisconsin Supreme Court in *State v. Yoder, et al.*, 49 Wis. 2d 430, 182 N. W. (2d) 539 (1970), making an exemption for the respondents and other members of their religious sect from the Wisconsin compulsory attendance law violate the prohibition against the establishment of religion as contained in the First Amendment in the United States Constitution?

(3) Whether the exemption is mandatory and required to be made or whether an exemption granted respondents is properly within the prerogative of the state legislature to grant or withhold as it pleases?

(4) Whether the Wisconsin Supreme Court correctly applied *Sherbert v. Verner,* 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, (1963), or whether it should have applied *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645, (1943)?

(5) Does a minor child have a constitutionally protected right to an education superior to the claim of respondent parents that education of their children beyond eighth grade violates respondents' constitutional right to worship freely?

STATUTORY PROVISIONS INVOLVED

The statutes involved in this petition are:

Section 118.15 (1) (a), Wisconsin Statutes, 1969.

"Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

Section 118.15 (5), Wisconsin Statutes, 1969.

"Whoever violates this section or files a false statement under s. 118.16 (1) may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both. In a prosecution under this subsection, if the defendant proves that he is unable to comply with the law because of the disobedience of the child in question, the action shall be dismissed and the child shall be proceeded against as delinquent under ch. 48."

United States Const. art. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

At least two of the respondents in this case are members of the Old Order Amish religious sect. Apparently a third, while Amish, is not a member of the Old Order. The respondents were each accused of violation of sec. 118.15 (1), Wis. Stats., 1969, hereafter referred to as the compulsory attendance law. Pursuant to agreement, the cases were tried together by the County Court of Green County, Wisconsin, on April 2, 1969.

The trial court after the conclusion of the trial and oral arguments, found that at the times and places charged in the complaint the Amish children of the respondents were between the ages of 7 and 16 years; they were not attending a high school, vocational school, technical school, or a private school of any kind. Each of the respondents was a parent of one of the children and each concurred in his child's nonattendance and made the decision that such child should not attend school. The trial court concluded and found that the respondents were guilty and filed an extensive memorandum opinion supporting this position.

On appeal to the Circuit Court of Green County, respondents were granted trial *de novo* and that court likewise found the respondents guilty and filed a memorandum decision in support of the finding.

HOW FEDERAL QUESTION IS PRESENTED

Prior to trial respondents raised by motion in the trial courts the question of whether the Wisconsin compulsory education laws violated the freedom to worship clause of the First Amendment of the United States Constitution. See App. II.

The county and circuit courts of Green County, Wisconsin, considered the issues and after the trial, denied respondents' motions involving the constitutionality of the statute. See App. II.

All respondents appealed to the Wisconsin Supreme Court and on January 8, 1971, the judgment of that court reversed the judgments of the lower court. See App. I.

There are seven members of the Wisconsin Supreme Court. One Justice wrote the "principal" opinion containing the rationale for reversal; however, five other Justices joined in a concurring opinion modifying the conclusion of the principal opinion and one Justice dissented.

AMISH BACKGROUND

A considerable amount of the trial was taken up with the testimony of two expert witnesses for the respondents. One of these witnesses, John A. Hostetler, is the author of a definitive work the Amish Society, John A. Hostetler, Revised Edition, John Hopkins Press (1968).

At least a cursory understanding of the complex nature of the Amish society and their ways is necessary to an understanding of the importance of this case. The following quotations are from the above work and the references are to the page numbers of the work:

> "The outside observer cannot help but be aware of the distinctiveness of the Amish people. All he needs to do is drive through any Amish community and observe the Amish team of horses, the carriages driving on the highway, the farm homesteads, and the dress of the people. On visiting a farm he will observe distinctions in farm implements, furniture, and books. All Old Order Amish communities are distinctive in maintaining a doctrine and practice of nonconformity to the world. These major points of the charter forbid the Amishman to engage in war, in

politics, or in a business with an outsider for a partner. This belief also finds expression in the restrictions against electricity and telephones. Distinctiveness is apparent to the insider by a recognized way of life and by the many symbols of group identity: styles of clothing and grooming, a distinct language, a common occupation, intimate knowledge of other members of the community, and religious ceremony and common sentiment. pp. 9-10.

"The basic social unit of the Amish community is small. This primary, self-governing unit, wherever Amish live, is the 'church district.' The rules of life are determined by this local bandlike organization, which is kept small by the ceremonial functions of assembling in a single household and by the limitation imposed by horse-and-carriage travel. * * * This small unit, from thirty to forty households, is the congregation. Households take turns having biweekly religious services in their homes * * *. The district is the evaluating and decision-making social unit. * * * Each district has its own ordained officials and there is almost no other formal organization. * * * pp. 12-13.

"The sanctions against those who deviate from the *Ordnung* are among the most effective means of control. The social controls are primary and are initiated by the local district. Punishment or the threat of punishment is a strong incentive for conforming to the norms. Transgressors are subject to the counsel of the entire little-church community. To be expelled or to be received back into full fellowship requires a unanimous vote. Minor offenses may be punished by making a confession to the church, provided the transgressor is not stubborn about making the confession when he is admonished. Major offenses are punishable by excommunication, which requires avoidance—the latter is called shunning, or the ban." p. 14.

REASONS FOR GRANTING THE WRIT

A. This Case Is In Direct Conflict With United States Supreme Court Cases And Numerous State Jurisdictions Dealing With The Subject.

The judgment in the case at bar is contrary to *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 166, 168, 64 S. Ct. 438, 88 L. Ed. 645, (1943). In that case the Court stated:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244; *Davis v. Beason,* 133 U. S. 333, 33 L. Ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control *by requiring school attendance,* regulating or prohibiting the child's labor, and in many other ways. (Emphasis added).
>
> "* * *
>
> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."

In Galanter Religious Freedoms, 1966 Wisconsin Law Review, 217, at page 299, is the following summary of the law with respect to compulsory school attendance *vis a vis* religious freedom:

> "A parent does not have a right to withhold his child from all secular schooling or from secular schooling that he thinks is religiously detrimental. But he does have a right to send him to a religious school which meets the requirements of the state's education laws. Religious societies have a right to operate such schools. Parents may not inculcate religion by practices which violate school attendance laws—even to observe their Sabbath or religious holidays—or child labor laws."

In addition to the legal recognition of the common legislative authority and intent of the child labor and compulsory attendance law, the common relationship is well documented historically in The Transformation of the School, Lawrence A. Cremin, Alfred A. Knopf, New York (1961), page 127:

> "Massachusetts passed the first state-wide compulsory-attendance law in 1852; Mississippi was the last of the states to pass one, in 1918. During the interim educational reformers learned some painful facts of political life. They discovered, among other things, that passing a law does not necessarily get children to school; that in the absence of proper statistical records there is no way of knowing in the first place whether or not children are attending; that without effective enforcement procedures the very children the law is designed to coerce escape its beneficent influence; and that without correlative measures regulating child labor and employment a compulsory attendance law is a sham, unenforceable and ultimately meaningless."

It is also well documented in State Law on Compulsory Attendance, Steinhilber & Sokolowski, H. E. W., Office of Education, page 3-4:

> "Child labor and school census laws are closely allied to compulsory school attendance laws.

"* * *

"Enforcement of the compulsory school attendance laws with stricter youth employment statutes, more effective accounting procedures, and school census laws have led to dramatic growths in school enrollment. * * *"

The principle of *Prince v. Commonwealth of Massachusetts, supra,* has recently been reaffirmed in *Ginsberg v. State of New York,* 390 U. S. 629, 20 L. Ed. 2d 195, 88A S. Ct. 1274, (rehearing denied) 391 U. S. 971, 88 S. Ct. 2029 (1968).

In addition, the importance of education for the child and the compelling interest of a democratic society in education has been the subject of numerous other cases, for example, *Meyer v. State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), *West Virginia State Bd. of Education v. Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), *Abington School District v. Schempp,* 374 U. S. 203, 83 S. Ct. 1560 10 L. Ed. 2d 844, (1963).

In addition to this the jurisdictions of several states have been unanimous in their holding that the compulsory attendance laws constitute a valid exercise of the police power of the state and the doctrine of *parens patriae* to protect the best interests of society by securing to children the opportunity to acquire an education. These cases are *State v. Garber,* 197 Kan. 567, 419 P. 2d 896 (1966), Cert. Denied 389 U. S. 51, 88 S. Ct. 236, 19 L. Ed. 2d. 50, *State v. Hershberger,* 103 Ohio App. 188, 144 N. E. 2d 693 (1955), *Commonwealth v. Smoker,* 177 Pa. Super 435, 110 A. 2d 740 (1955), *People v. Turner,* 263 P. 2d 685 (1953) (appeal dismissed), 347 U. S. 972, 98 L. Ed. 1112 (1953), *Commonwealth v. Beiler,* 168 Pa. Super 462, 79 A. 2d 134 (1951), *Commonwealth v. Bey,* 166 Pa. Super 136, 70 A. 2d 693 (1950), *Rice v.*

Commonwealth, 188 Va. 224, 49 S. E. 2d 342 (1948), *Marsh v. Earle,* 24 F. Supp. 385, 14 A. 2d 368 (1938), *Stephens v. Bongart,* 15 N. J. M. 80, 189 A. 131 (1937), *State v. Williams,* 56 S. D. 370, 228 N. W. 470 (1929), *Parr v. State,* 117 Ohio 23, 157 N. E. 555 (1927), *DeLease v. Noland,* 185 App. Div. 82, 172 N. Y. S., 552 (1918), *State ex rel. O'Bannon v. Cole,* 220 Mo. 697, 119 S. W. 424 (1909), *State v. Jackson,* 71 N. H. 552, 53 A. 1021 (1902), and *State v. Bailey,* 157 Ind. 324, 61 N. E. 730 (1901).

All of these cases have upheld the validity of compulsory attendance laws. We have been unable to find any case to support the holding of the Wisconsin Supreme Court that the compulsory attendance laws of the State of Wisconsin are unconstitutional as applied to the Old Order Amish.

B. Importance Of The Wisconsin Decision

Forty-eight states have compulsory education laws. In 1964, there were 13,470,000 children with the age group affected by these compulsory attendance laws. There are at least 20 states in which members of the Amish faith live. A recent study by the Wisconsin Legislative Council (See Wisconsin Legislative Council Staff Report to the Education Committee on the Amish Community in Wisconsin and Selected Other States, February, 1968, p. 13) discloses that "[O]f a total of 250 churches, Ohio has 74, Indiana 57 and Pennsylvania 54." The report goes on to state:

> "The 1967 *Mennonite Yearbook* lists 5 in Wisconsin. Since the Amish keep few church records of their own and unwillingly respond to religious censuses by outsiders, their population can only be estimated. *The Mennonite Yearbook* annually carries all the available Amish membership data with a list of church districts and their

leaders. Allowing for churches that failed to report in the current issue of the *Yearbook* it has been estimated that there are 19,000 baptized Old Order Amish members. Since baptism is not performed until a person is in his late teens, probably over half of the Amish population are not included in the above figure."

Table 1 of the Report indicates that in the year 1967-68, there were 93 Amish children in public schools in Wisconsin and 163 in private Amish schools. It is not known how many Amish children in Wisconsin are not attending any school of any kind.

The concurring and principal decisions of the Wisconsin Supreme Court take a view regarding the importance of education which is contrary to that expressed as follows in *Brown v. Board of Education of Topeka,* 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873, (1954):

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. * * *"

Of the 48 states that have compulsory attendance laws, some have granted exemption to the Amish. However, all states have presumed the law to have been, up to the time of the Wisconsin decision, constitutionally applicable to all

children regardless of the religious beliefs of their parents. *Prince v. Commonwealth of Massachusetts, supra.* Because of its breadth and uniqueness, the judgment of the Wisconsin Supreme Court, if allowed to stand, will have great impact on the effectiveness of the compulsory education laws of the other 47 states. In the principal decision (*State v. Yoder, et al,* 49 Wis. 2d, 430, 436, 437, 182 N.W. (2d) 539 (1970)) the Court correctly stated but erroneously applied the proposition that the free exercise clause of the First Amendment is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes practice or exercise of religion which is binding in conscience. *Welsch v. United States,* 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308, (1970). The decision will certainly, if allowed to stand, be used for authority to support attacks on the compulsory education laws by the Amish in other states and by non-Amish throughout Wisconsin and the nation who, because of their conscientious beliefs, would argue that they are entitled to equal protection of the laws. This case is of national importance.

C. The Limits Of *Sherbert v. Verner,* 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963), And In Particular The Relationship Of That Case, If Any, To The Compulsory School Attendance Laws Should Be Established.

The concurring and principal opinions of the Wisconsin Supreme Court propound an important, although erroneous, broadening of the decision in *Sherbert v. Verner, supra.*

First, the opinions completely ignore the *parens patriae* doctrine which forms the basis for compulsory education

laws. No effort has been made by the Wisconsin court to equate this basic concept of well ordered liberty to the "compelling interest" requirement of *Sherbert v. Verner, supra.*

> "* * *The doctrine of parens patriae expresses the inherent power and authority of the state to provide protection of the person and property of a person non sui juris. * * *" 67 C.J.S., *Parens Patriae,* 624.

The substantive nature of this doctrine has not been altered or redefined as a result of *Re Gault,* 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, (1967). That decision deals primarily with the procedural aspects of the exercise of the doctrine. In fact, *Re Gault, supra,* bolsters the right of minors in the area of procedural due process. In contrast, the principal and concurring opinions remove the substantive right of children to an education which is secured to them by *parens patriae* and puts that doctrine back in the realm of the ecclesiastical law where it hasn't resided since at least the time of Henry VIII.

Second, the majority opinions produce a piece of judicial legislation which violates the establishment clause of the First Amendment to the United States Constitution. The decision in which five of the Justices agreed, exempts the Amish parents from the requirement that all parents be required to send their children to some school until the children are 16 years old. The exemption granted is as follows:

> "* * * children of members of the Old Order Amish religion, * * * living as members of the Amish Community, should not be required to attend a school which meets the requirements of state law beyond the eighth grade." *State v. Yoder, et al., supra.,* 447.

Given the mandate above, officials of the Wisconsin educational system are required to determine on a frequent

and regular basis the type and kind of membership of the Amish in Wisconsin and whether such Amish are actively living in the community.

Because of among other factors the wide variety of beliefs, conditions of membership, and the Amish theological concept of community as opposed to the natural geographic limitations of a community, the State of Wisconsin would be inexorably drawn into the "impermissible degree of entanglement" objected to in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697, (1970).

Further, with respect to the establishment clause it should be pointed out that *Sherbert v. Verner, supra.*, restored appellant's right to worship freely and what is equally important to the consideration of the establishment clause, placed the appellant on a par with Sunday worshipers thereby fulfilling the constitutional requirement of neutrality in the face of religious differences. In the case at bar the principal and concurring opinions erroneously ignore this rationale in applying the *Sherbert* doctrine. Here the Wisconsin Supreme Court has upset the neutral posture of the compulsory attendance law by carving out an exception for the Amish. A definitive statement on the breadth of the application of *Sherbert v. Verner, supra.*, and the limits of the Court in the exercise of the benevolent neutrality doctrine is needed. See Public Aid to Parochial Schools, Paul A. Freund, Vol. 82, Harvard Law Review, 1680 (1969).

D. The Constitutional Exercise Of "Benevolent Neutrality" Is Within The Province Of The Legislature And Not The Courts.

In all states where Amish religious beliefs have been accommodated to the compulsory attendance laws, the result has come by action of the legislative branch of government. The Wisconsin decision is the only one which has judicially legislated an exemption for the Amish.

The Wisconsin Legislature recently considered and rejected an attempt to accommodate the Amish through modification of the compulsory attendance law. In February of 1968, the Wisconsin Legislative Council Staff Report To The Education Committee On Amish Community In Wisconsin, at page 29, concluded:

> "There is a lack of unanimity among the members of the Amish communities in Wisconsin as to their attitudes toward public education which may make it unnecessary and certainly difficult to devise specific proposals exempting them from school policies and requirements."

All of the states granting exemptions to the Amish from compulsory education laws have done so on the basis that it is permissive, not mandatory, to do so; that the compulsory attendance law is constitutional as applied to the Amish and that it is within the province of the legislature to make the exception.

The legislative purpose of the compulsory attendance law is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. In common with 47 other states, Wisconsin has had, since 1879, a compulsory attendance law. The first compulsory attendance law in this country

was passed in colonial Massachusetts in 1642. In 1852 the Commonwealth of Massachusetts passed the first compulsory attendance law. Much of what is said about the exemption of religious institutions from taxes is applicable to the compulsory attendance laws. *Price v. People of the State of Illinois,* 238 U.S. 446, 35 S. Ct. 392, 59 L. Ed. 1400 (1915), *United States v. Carolene Products Co.,* 323 U.S. 18, 65 S. Ct. 310, 89 L. Ed. 15 (1944), *Wisconsin Protestant Home for the Aged v. City of Milwaukee,* 41 Wis. 2d 284, 164 N.W. (2d) 289 (1968), and *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

Assuredly, exemptions to laws implementing such institutions of our society as taxes and education are within the prerogative of the legislature, not the judiciary to establish. The Walz Decision: More On The Religion Clauses Of The First Amendment, Kauper, Vol. 69, Mich. L. Rev. 179, 198 (December, 1970).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of the State of Wisconsin. See: *Gillette v. United States,* docket no. 85, and *Negre v. Larsen, etal.,* docket no. 325, both cases decided March 8, 1971, U.S. , S.Ct. , L.Ed. 2d , 39 Law Week 4305.

Respectfully submitted,

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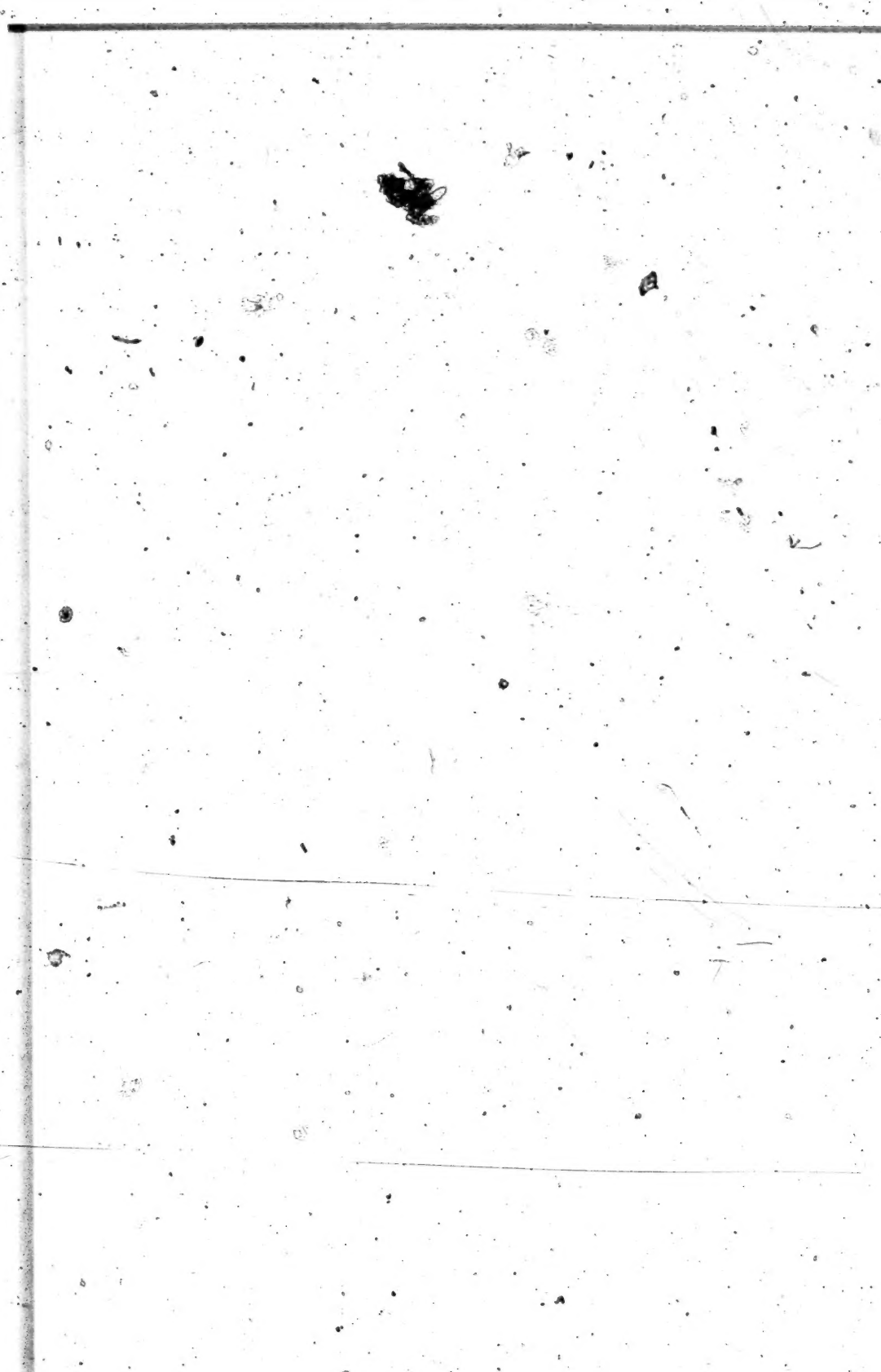

APPENDIX I

170 FILED
JAN - 8, 1971
FRANKLIN W. CLARKE
Clerk of Supreme Court
Madison, Wisconsin

State Nos. 92, 93, & 94

August Term, 1970

STATE OF WISCONSIN IN SUPREME COURT

State No. 92
STATE OF WISCONSIN, Respondent,

vs.

JONAS YODER, Appellant.

State No. 93
STATE OF WISCONSIN, Respondent,

vs.

ADIN YUTZY, Appellant.

State No. 94
STATE OF WISCONSIN, Respondent,

vs.

WALLACE MILLER, Appellant.

APPEAL from a judgment of the circuit court for Green county: ARTHUR L. LUEBKE, Circuit Judge. *Reversed.*

The appellants Jonas Yoder, Adin Yutzy, members of the Old Order Amish religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church, were convicted in the county court of violating Wisconsin Compulsory School

171 Attendance Law (sec. 118.15, Stats.). Their children, Frieda Yoder, aged 15 years, Barbara Miller, 15, and Vernon Yutzy, 14, are graduates of the eighth grade of the New Glarus public school. The appellants refused to enroll them in the public high school for the fall 1968 school term as required by the compulsory school law,[1/] and were fined $5 each. The convictions were affirmed by the circuit court.

The appeal to this court and the defense in the lower courts involve the fathers' right to religious liberty and whether sec. 118.15, Stats., as applied to them violates the Free Exercise Clause of the First Amendment of the Constitution of the United States,[2/] made applicable to the states by the Fourteenth Amendment. The trial court held the compulsory school law did interfere with the freedom of the appellants to act in accordance with their sincere religious beliefs but concluded the statute represented "a reasonable constitutional exercise of a governmental function of the state."

172 HALLOWS, C.J. No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment. This appeal poses the question of whether the compulsory education law of this state, as applied to the Amish, infringes their religious liberty and, if so, whether such interference is constitutionally justified.

[1/] The pertinent provisions of that statute are:

"(1) Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age."

[2/] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. The Fourteenth Amendment reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

If the compulsory education law is to withstand the appellants' constitutional challenge, it must be either because the statute does not interfere with a constitutional freedom to act in accordance with their sincere religious beliefs or because the burden on the free exercise of appellants' religion is justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . " *NAACP v. Button* (1963), 371 U.S. 415, 438, 83 Sup. Ct. 328, 9 L. Ed. 2d 405. The determination of whether a law infringing religious liberty is justified requires the weighing of the burden on the free exercise of one's religion and the importance of the state's interest asserted in justification of the substantial infringement. *Sherbert v. Verner* (1963), 374 U.S. 398, 83 Sup. Ct. 1790, 10 L. Ed. 2d 965.

Is There Any Infringement
Of The Free Exercise Clause?

"The Amish as an independent sect were founded in 1693, near Erlenbach, Bern, Switzerland. Jakob Ammann, a Swiss Anabaptist and a follower of Menno Simons and the Mennonites, broke with his church in disagreement over what he felt were unwarranted departures from traditional
173 practices. The Amish, the followers of Ammann, thus dedicated themselves to maintaining the old practices and resisting any capitulation to the sin of worldliness. . . .

"The Old Order Amish are the most conservative and traditional of the several branches of the sect, numbering about fifty thousand children and adults in the United States." *The Amish and Compulsory Education*, 53 Va. L. Rev. 925, 933.

The rules of conduct of the Amish religion in its folk culture context are incorporated in the Ordnung of each community but ordinarily are not articulated and codified in writing as some tenets in other theistic religions. Compliance with the Ordnung is enforced by sanctions of excommunication and shunning. *See* Hostetler, *Amish Society* (1963), p. 63; Yoder, *Caesar & The Meidung*, 23 Mennonite Qtrly. Rev. 76, 98 (1949). Many of the tenets of the religion are found in *The Confession of Dortricht* (1632)[3]/ discussed in *Commonwealth v. Beiler* (1951), 168 Pa. Super. 462, 79 Atl. 2d 134, 136. The lack of codification of the Amish tenets is of no concern. The Free Exercise Clause does not require the codification of religious tenets nor does this clause define the scope of religion. For its purpose, religion defines itself and binds the individual conscience.

174 At the trial the appellants put in evidence by expert testimony the full range of the Amish religous beliefs and the tenets of the Old Order Amish religion. Dr. John A. Hostetler[4]/ testified the Amish religion requires as a part of the individual's way of salvation a church community separate from the world. The Amish separateness is dictated by their religious belief of what God's will is for them and thus all the means by which they maintain this unique separateness have religious meaning.

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[3]/ It is stated by Robert C. Casad in his article entitled *Compulsory Education and Individual Rights*, 5 Religion And The Public Order 55, the most basic tenet of the Amish religion of separation from the world relies on the Scripture, Romans [12:1], "Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good, and acceptable, and perfect, will of God," and II Corinthians 6:14, "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?" To the Amish, these beliefs "are not mere social philosophy: They are fundamental to the whole question of their existence on earth."

[4]/ Professor at Temple University; author of "Amish Life (1968)," "Amish Society (Revised Ed. 1968)."

The Old Order Amish religion dictates that the Amish child from the inception of adolescence live according to the mode of life in the Amish community; that he should not attend high school since any high school, public or private, constitutes a deterrent to his salvation. The period of adolescence is critical in the religious and cultural development of the child because at this time the child enters gradually into the fullness of Amish life, is given responsibilities which would be directly interfered with if he were compelled to go to high school, and accepts adult baptism. Thus, the Amish religion requires the avoidance of worldly educational environment and imposes the duty on the adolescent to become mature in a wisdom different from what others may regard as wisdom and in skills and responsibilities which are proper and fitting for a life different from what others may wish to pursue. To the Amish, how long a child should attend a formal school is a religious question.

175 This court does not evaluate, and in fact is prohibited from evaluating, a religious belief for ecclesiastical purposes. *Abington School Dist. v. Schempp* (1963), 374 U.S. 203, 83 Sup. Ct. 1560, 10 L. Ed. 2d 844; *Presbyterian Church v. Hull Church* (1969), 393 U.S. 440, 89 Sup. Ct. 601, 21 L. Ed. 658. Irrelevant, too, is this court's opinion, if it has one, of the validity, the reasonableness, or the merits of the Amish religious beliefs.

The state's argument that the appellants' refusal to obey the compulsory school law is no part of their worship but merely a practice or a way of life cannot be accepted. The Free Exercise Clause is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes the practice or the exercise of religion which is binding in conscience. *See Sherbert v. Verner, supra,*

and *In Re Jenison* (1963), 265 Minn. 96, 120 N.W. 2d 515; (1963) 375 U.S. 14, 84 Sup. Ct. 63, 11 L. Ed. 2d 39; (1963), 267 Minn. 136, 125 N.W. 2d 588. There is no question that, as found by the trial court, the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the First Amendment.

The Weighing of Conflicting Interests.

(A) The Burden on the Constitutional Right.

In balancing the competing factors to find the justification of the compulsory school law, we must first examine the burden caused by its interference with the free exercise of the appellants' religion. How heavy is the burden? We think it is clear the burden of compulsory education is a heavy one. The law commands the appellants to perform affirmative acts which are repugnant to their religion. To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into a homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child. The law also places a choice upon each of these fathers to either obey its commands and risk the loss of his salvation or to disobey the law and invite criminal sanctions. The sincerity of the appellants in their beliefs and in their religion cannot be questioned; such sincerity was stipulated in the record.

The impact on the Amish of compulsory education laws is so severe that in other states where they were required to send their children to public schools, they sold their farms and sought religious freedom elsewhere. Some of the Amish in Wisconsin were the victims of daily fines which became so

severe that they were suspended by the governor of Iowa and they sought religious freedom here, in a spirit and with a hope not unlike the Pilgrim Fathers who came to America. *See Clippings: Relation of religion to secular society: Separation of church and state: Church organization and membership,* Wis. Legislative Reference Library. When the Amish can no longer move, the impact may result in the extermination of their religious community.

There is another impact on the Amish children themselves if they are required to go to high school. They would experience a useless anguish of living in two worlds. Either
177 the education they receive in the public school is irrelevant to their lives as members of the Old Order Amish or these secondary school values will make life as Amish impossible. At the trial, one of the children testified she did not want to go to high school. Since the children are not being sued as truants, we do not reach the question of whether they have an independent right of the free exercise of their religion to be protected here. We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates.

(B) *Compelling State Interest.*

On the other side of the scale we have compulsory education which in itself is not a compelling interest although it is within the state power to regulate. It is not sufficient for the state to show a regulation as a direct relation to a policy goal. A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation.

Compulsory education in the United States began in 1642[5]/ and in this state in 1889. The two Wisconsin cases[6]/ which have considered our compulsory school law add little to the issue because neither involves any claim of exemption based upon a religious right.

General interest in education was expressed in *Meyer v. Nebraska* (1923), 262 U.S. 390, 400, 43 Sup. Ct. 625, 67 L. Ed.
178 1042, when the court said, "The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted." In *Brown v. Bd. of Education* (1954), 347 U.S. 483, 493, 74 Sup. Ct. 686, 98 L. Ed. 873, the court noted that education was required in the performance of our public responsibilities and was the foundation of good citizenship; it was the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment.

The Amish point out that the education talked about in these cases is for a world which is not theirs; that their cultural values are different; that their life requires no professional training and that two years of high school education does not help Amish children to adjust normally to their Amish environment. The Amish claim, with compelling merit, that their education produces as good a product as two additional years' compulsory high school education does.[7]/

[5]/ Note, *The Amish and Compulsory Education*, 53 Va. L. Rev. (1967), 925, 930.

[6]/ *State v. Freudenberg* (1917), 166 Wis. 35, 163 N.W. 184; *In Re Alley* (1921), 174 Wis. 85, 182 N.W. 360.

[7]/ Defense witness Wilbur E. Deininger, sheriff of Green county from 1963 to 1967, undersheriff in 1967 and 1968, and a present member of the city of Monroe department of police, testified that, to his knowledge, no teenage member of the Old Order Amish group dwelling in Green county had ever been apprehended or arrested for crime or engaged in acts of violence.

Defense witness Ray F. Kaskey, for the past nine years director of the department of social services for Green county, testified he knew of no Amish in the county who had been recipients of public assistance, had been unemployed or received unemployment compensation, had illegitimate births, been residents of publicly supported homes for the aged, the indigent, the physically or mentally ill, or alcoholics. He further stated the Amish people did not add to the social burdens which the taxpayers of Green county must bear, and that the fact the Amish children do not attend high school has no effect in adding to the social burdens carried by these taxpayers.

179 The state argues that in its capacity of *parens patriae* it can regulate children when it might be unreasonable to apply such restraints to adults. This is true but there are constitutional limitations on the doctrine of *parens patriae*. Here, the state has substituted its judgment of the type of education for the judgment of the natural parent and has made no allowance for the religion of the child or the religion of the parent. The doctrine of *parens patriae* as applied to juvenile-court procedure has recently received a set back in *In Re Gault* (1967), 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527, where a child's right to counsel was held supreme over the benign protection of the state.

In the important matter of freedom of religion, the natural parents should have the right to rear their children in their religion, especially as here, where the parents are in agreement and the tenets of their religion require them to render such upbringing. When a child reaches the age of judgment, he can choose for himself his religion, but prior to that time the state in its capacity of *parens patriae* ought not to enforce educational requirements which will directly influence or destroy that choice. Nor is this harm to the Amish justified because on speculation some Amish children may after reaching adulthood leave their religion. To force a worldly education on all Amish children, the majority of whom do not want or need it, in order to confer a dubious benefit on the few who might later reject their religion is not a compelling interest.

The state relies on *Prince v. Commonwealth of Massachusetts* (1944), 321 U.S. 158, 64 Sup. Ct. 438, 88 L. Ed. 645, for its justification to regulate the affairs of children. But
180 *Prince*, while involving a child labor law, was more concerned with public safety. In *Prince*, the defendant (a

Jehovah Witness) was convicted of allowing a 9-year-old child to sell religious magazines on a public street corner in the evening. While a religious claim was asserted and a weighing analysis made, the court found the public interest was compelling. This holding is not persuasive in this sensitive area where each case must be evaluated on its facts. Since the same court does not decide all the cases, there is bound to be a difference of opinion.

Thus in *Sherbert v. Verner, supra,* the court held a Seventh Day Adventist could not be denied unemployment compensation benefits by South Carolina because she refused to work on Saturday, her Sabbath. The purpose underlying the denial of unemployment compensation was not a compelling reason and did not justify the placement of a substantial burden upon a religious right. The purpose of the denial, *i. e.*, not to foster indolence, was not defeated by a religious exception. Furthermore, the legislation required, as in the instant case, an act forbidden by religion. Thus, the court found a constitutional exception for Sabbatarians from the South Carolina law. In *People v. Woody* (1964), 61 Cal. 2d 716, 394 Pac. 2d 813, the California supreme court made an exception for the use of a narcotic, peyote, which was used by the Native American Church in its ritualistic worship. The court considered the small use for a religious purpose not to be subversive of the underlying purpose of the narcotic laws to protect public health and the impact of the restriction on religion to be great.

181 *Sherbert* requires us to ask whether an exemption of the compulsory education law for the Amish would defeat the purpose of compulsory education. We think not. If the purpose of the law is to enable one to perform his public duties, then

there is precedent for an exception. The court in *In Re Jenison* (1963), 265 Minn. 96, 120 N.W. 2d 515, (1963) 375 U.S. 14, 84 Sup. Ct. 63, 11 L. Ed. 2d 39, (1963) 267 Minn. 136, 125 N.W. 2d 588, on remand from the United States Supreme Court for reconsideration in the light of *Sherbert*, found an exception from jury service for a person whose religion would not allow her to judge others. Here, the public duty of jury service, like the instant case, required an affirmative act contrary to religious conscience. The court found no great impact on the jury system by an exception. The exemption recognizing the religious interest was an accommodation to effectuate the guarantee of the Free Exercise Clause.

Likewise, in the flag-salute cases, *West Va. State Bd. of Edu. v. Barnette* (1943), 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628, an exemption was found to a requirement to perform an affirmative act which was contrary to religious belief but in fulfillment of the duties of a citizen. As in the jury case, no catastrophy would result from the exemption, nor would any great harm result to the person involved or to others from the exemption. The impact of such an exemption was slight on the underlying purposes and objectives of the state regulation to foster good citizenship.

182 We recognize where harm from the granting of an exemption will result either to the person involved or to others, and where the act required, although against religious beliefs, is passive in nature, some courts have found the state's interest to be paramount or compelling. Generally, such acts have not interfered directly with acts of sacramental worship or seriously with the exercise of one's faith. Thus, vaccination was required in *Cude v. State* (1964), 237 Ark. 926, 377 S.W. 2d 816, and the blood transfusions in *Application of the President & Directors of Georgetown College, Inc.* (C.A. D.C., 1964), 331 Fed. 2d 1000, *cert.* den. 377 U.S. 978. But

to the contrary; see *In Re Estate of Brooks* (1965), 32 Ill. 2d 361, 205 N.E. 2d 435. It is not claimed by the Amish that the government cannot reasonably regulate some acts religiously motivated, but they point out that compulsory education in its affect on the Amish religion is far more harmful than the effects of vaccination or a blood transfusion was on religion.

We think it is even less possible to assert a spurious claim for exemption under this case than under *Sherbert*. Claims for such an exemption can easily be detected because of the uniqueness of the Amish people. Nor is there merit in the state's argument that its administrative expense and inconvenience of an exemption should be avoided. Here, the state is put to no expense by the exemption. True, Green county may lose a few dollars in state aid but this amount can hardly be the basis of a compelling state interest.

83 Granting an exception from compulsory education to the Amish will do no more to the ultimate goal of education than to dent the symmetry of the design of enforcement. The right to the free exercise of one's religion under the First Amendment should be accorded as much protection as the other First Amendment guarantees of Free Speech and Freedom of the Press. In those cases the nature of the right is accorded great weight against governmental regulation. The right to worship your God or to practice your religious beliefs are as important as the right to speak or print freely and may, to the individual involved, be more important.

Establishment Clause:

In granting the exemption in *Sherbert* to the Seventh Day Adventist, the court stated its decision was not fostering

the establishment of the Seventh Day Adventist religion in South Carolina but "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." This is the answer to the state's argument that to recognize an exemption for the Amish would violate the Establishment Clause. This case does not involve the Establishment Clause and the state misconceives the doctrines of neutrality and accommodation. Authorities now recognize the Free Exercise Clause and the Establishment Clause overlap, can conflict, and cannot always be squared on any strict theory of neutrality. *See Abington School Dist. v. Schempp, supra.* The
184 "free exercise neutrality" may require a state to make special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulations.[8]/ This principle of neutrality is exemplified by the *Sherbert, Woody,* and *Jenison Cases.* As was recently said in *Walz v. Tax Commission* (1970), 397 U.S. 664, 668, at p. 669, 90 Sup. Ct. 1409, 25 L. Ed. 2d 697, which held tax exemption of religious proprety was constitutional:

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is

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[8]/ *See* Katz, *Freedom of Religion and State Neutrality,* 20 U. Chi. L. Rev. 426 (1953), and Religion and American Constitutions (1964); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich. L. Rev. 1031 (1963); Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation,* 1963 Religion and The Public Order 3, 29 (1964). *See* also *Braumfeld v. Brown* (1961), 366 U.S. 599, 608, 81 Sup. Ct. 1144, 6 L. Ed. 2d 563, where the court said that statutory exemption for Sabbatarians from Sunday closing laws would be permissible.

this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and
185 practices or have the effect of doing so." *See* also *Board of Education v. Allen* (1968), 392 U.S. 236, 88 Sup. Ct. 1923, 20 L. Ed. 2d 1060.

Other Cases Involving the Amish.

The three cases involving compulsory education and the Amish in other states have denied religious freedom but they are not controlling or persuasive. These are *State v. Hershberger* (1955), 103 Ohio App. 188, 144 N.E. 2d 693; *Commonwealth v. Beiler* (1951), 168 Pa. Super. 462, 79 Atl. 2d 134; and *State v. Garber* (1966), 197 Kan. 567, 419 Pac. 2d 896, *cert.* den. 389 U.S. 51, 88 Sup. Ct. 236, 17 L. Ed. 2d 50. Two of these cases, *Hershberger* and *Beiler,* were decided before *Sherbert* and rely heavily on the dubious distinction between religious belief and religious conduct. *See Cantwell v. Connecticutt* (1940), 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213. Thus the court in *Hershberger* reasoned that requiring the Amish to provide an education for their children
186 would not abridge their right to worship, concluding therefrom that no question of infringement of religious freedom was involved. In light of *Sherbert,* the validity of such reasoning is to be doubted since the guarantee of free exercise of religion covers more than sacramental acts of worship.

In *Beiler* the court gave recognition to the conflict between compulsory education and religious liberty but having drawn the balance, proceeded to mechanically add to the state's side a series of cases upholding a restriction on religious conduct.[9]/ No analysis in those cases was made of the relative importance of the religious beliefs in issue or of the degree to which enforcement of the law infringed upon those beliefs. Nor did the court consider the effectiveness of the regulatory purpose or the practicability of an exemption. The type of an analysis used does not satisfy today's standards in dealing with constitutional questions. It is also significant that the *Beiler* decision has been modified by the Pennsylvania legislature.[10]/

187 In *State v. Garber*, the Kansas court considering the problem after Sherbert, held that the law was to be enforced against the Amish. The appellants' contention that *Garber* reflects an insensitive consideration of the Amish religion is in part supported by a reading of the opinion. *Garber* followed the *Beiler* court's mechanical separation of religious conduct from religious belief, implying that the constitutional protection is afforded only to beliefs connected to the act of worship and held that since the compulsory

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[9]/ *Reynolds v. United States* (1878), 98 U. S. 145, 25 L. Ed. 244 (polygamy); *Stansbury v. Marks* (1793), 2 Dall 213, 1 L. Ed. 353 (conviction of a person of the Jewish faith who refused to be judicially sworn on a Saturday); *Hamilton v. Regents* (1934), 293 U. S. 245, 55 Sup. Ct. 197, 79 L. Ed. 343 (military training at state university); and *Prince v. Com. of Mass.*, *supra*.

[10]/ Note: 53 Va. L. Rev. (1967), 925, 951, describes the Pennsylvania plan which provides for the operation of day schools by church groups offering schoolwork programs to those fourteen and older who have completed the eighth grade. Each student spends no less than three hours a week in the "school" studying such subjects as English, mathematics, health and social studies, supplemented by outside agricultural and domestic projects. The note concludes "since perhaps the principle legitimate goal of compulsory education is to insure that children become useful and productive adults, and that they will not prove so dysfunctional as to become wards of the state," these "schools" ought to be as satisfactory as their trade school counterparts in urban communities.

attendance laws do not directly affect Amish worship, there was no abridgement of their religious freedom. But the Amish do not have a ritualistic form of worship. They have no churches as such. Their life style is dictated rather than motivated by their religion. The narrowness of the *Garber* concept of the scope of protection afforded by the Free Exercise Clause renders the case unpersuasive.

Garber has also lost luster because an exemption was provided in 1968 by the Kansas legislature. Kan. Stat. Annot., sec. 72-1111 (1968 Supp.). This exemption enables the Amish to comply with the Kansas law with its unique educational program. These legislative exemptions evince the fact the important goals of education can be attained by alternative forms of regulation without infringing first amendment rights.

We conclude that although education is a subject within the constitutional power of the state to regulate, there is not such a compelling state interest in two years high school compulsory education as will justify the burden it places upon the appellants' free exercise of their religion. Therefore, the Wisconsin Compulsory School Attendance Law,
188 sec. 118.15, Stats., is unconstitutional as applied to these Amish appellants, and the convictions must be reversed. If in the future the facts are such that the effectiveness of the compulsory education law will be seriously jeopardized by this exemption, we reserve the right to reexamine the question.

By the Court. — Judgments reversed.

189 State Nos. 92, 93, & 94

STATE OF WISCONSIN IN SUPREME COURT

State No. 92

State of Wisconsin,

Respondent,

v.

Jonas Yoder,

Appellant.

State No. 93

State of Wisconsin,

Respondent,

v.

Adin Yutzy,

Appellant.

State No. 94

State of Wisconsin,

Respondent,

v.

Wallace Miller,

Appellant.

HEFFERNAN, J. (dissenting) The principal opinion reaches an erroneous conclusion based upon questionable reasoning and a misstatement of the facts. Contrary to the implication of the opinion writer, the Amish were not prosecuted for failing to send their children to a public high school. They
190 were prosecuted for violation of sec. 118.15 (1), Stats., which requires attendance at school, whether public or *private*, until the end of the school period in which the child attains sixteen years of age. The distinction is important and is crucial to this dissent. The principal opinion rests in part upon the misconception that the defendants' only alternative to criminality is *public* school attendance for their children. Such is not the case. The law makes no such requirement.

The reasoning is faulty, for it conceives the problem as one of religious liberty alone. It completely ignores the personal liberty of the Amish children to avail themselves of educational opportunities beyond eighth grade. In addition, the freedom of these young people to make a religious choice is completely ignored.

That opinion states:

> "Since the children are not being sued as truants, we do not reach the question of whether they have an independent right of the free exercise of *their* religion to be protected here. We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates." (Emphasis supplied.)

This, of course, is the easy way out. It keeps intact the opinion's oversimplification of the problem and avoids completely the difficult question of the court's responsibility to see that the legislative mandate of universal education is carried out. It purports to strike a blow for religious liberty, but in so doing, it does little for religion and impinges upon personal liberty.

191 The principal opinion solves the balancing of religious interests with equal ease. Having once set up the postulate that the free exercise of religion cannot be impinged upon by the state unless there is a compelling state interest in the regulation, the syllogism is completed by the unsupported assertion that "compulsory education . . . is not a compelling interest although it is within the state power to regulate."

That assertion is contrary to a reasonable view of accepted law. *Brown v. Board of Education* (1954), 347 U.S. 483, 74 Sup. Ct. 686, 98 L. Ed. 873, stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

What could be a more compelling state interest than "the most important function of state and local governments."

The very organic act that first set up a political structure for the territory that is now Wisconsin emphasized the compelling public interest in education. Article III, Northwest Ordinance 1787, provided:

> "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education should be forever encouraged." Wis. Stats. Anno., Vol. 1, p. 740.

Subsequent amendments to the Ordinance provided that the proceeds of public lands were to be used for seminaries of learning. The enabling act under which Congress authorized the organization of this state directed that section 16 of every township should be granted to the state for school purposes.

Education has been a prime and compelling interest of this state since its very beginning.

This, of course, does not completely answer the question of whether the compelling interest of the state should be paramount to the obviously sincere belief of the Amish elders that school attendance ought not be compelled beyond a grade-school level. On one hand we find a legislative mandate of unquestionable compelling state interest — that all children attend school until the age of sixteen — and, on the other, a constitutional mandate that there shall be no state law that prohibits the free exercise of religion.

A court ought not to make a choice favoring either the
192 particular interest of church or state unless an irreconcilable conflict exists. Thomas Jefferson could not foresee that such conflicts could ever exist. He stated in his reply to an address of the Danbury Baptist Association in reference to the recently proposed freedom of religion amendment to the Constitution:

> "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." *Reynolds v. United States*, 98 U.S. 164.

While Jefferson's words express a hope rather than a realization, the lesson is clear: Conflicts between church and state, *i.e.*, between man's natural right of religious choice and his duty to his organized society, ought to be reconciled where possible, and judicial fiats declaring legislative enactments unconstitutional ought to be avoided except in the

clearest of cases and where all reasonable alternatives have been exhausted.

The principal opinion would also hold that the state has no compelling interest in a regulatory measure unless it has a "need to apply the regulation without exception to attain the purposes and objectives of the legislation." The argument, therefore, seems to be that to grant an exemption for such a small group as the Wisconsin Amish would have no effect upon the general policy of the state to further education, and the diminution of Amish children's education by two years is so insignificant as to be *de minimis*.

This argument misconceives the nature of the state's compelling interest in education. The purpose of education is not alone to provide a mass of educated, and hence, taxable citizens, but is, in addition, intended to educate the individual for life. The government's concern is not with enforcing a regulatory scheme. Rather, the concern is based upon the
193 precepts stated in the Northwest Ordinance, *supra*, that religion, morality, good government, and happiness are all dependent upon education. This is the compelling government interest.

This difficult problem cannot be dismissed as *de minimis*.

The state's interest and obligation runs to each and every child in the state. In the context of the public law of the state, no child's education is below the concern of the law. The principal opinion bolsters the *de minimis* argument by making the unsupported tacit assumption that all or most of the Amish children will forever remain in their communities. This is not necessarily a fact. Large numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world.

Those young Amish who leave the group have received no education that equips them for modern American life. By not enforcing the school attendance law, the State of Wisconsin has consigned these young people to a future without any choice or goal except those of the traditional Amish life. They are abandoned without the intellectual tools to survive should they elect to leave the Amish way of life.

The traditional Amish life has its attractions, but ought this court, be depriving Amish children of all but a bare eighth grade education, block for all time all other avenues for them. This is the effect of this decision. On the basis of the religious beliefs of their parents, the Amish children are without a hearing[1] consigned to a life of ignorance—blissful
194 as it may seem to the author of the principal opinion, who apparently views the Amish as "the noble savage," uncorrupted by the world. The reader is left with a picture of idyllic agrarianism. Unmentioned is the tragic side of Amish life: "Drinking . . . has become problematic" (Hostetler, *Amish Society*, p. 282); "Rowdyism and stress" (p. 281); "Preoccupation with filthy stories" (p. 282); "Drinking is common in all large Amish settlements" (p. 283); "It would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." It is highest among young men (p. 300). Amish society is perhaps but another microcosm of society—some of it is good and some bad. It is a cross-section of good and evil influences that pervade any society. But the children's denial of education ought not be justified on the mythological basis assumed by the principal opinion.

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[1] With our ostensible solicitude for the fate of children who are in other legal situations affected by conduct of their parents, it is surprising that no guardian ad litem was appointed to represent these children's interest. While the religious beliefs of the parents are at stake in this lawsuit, it is apparent that the children's interest is of equal importance. Reason dictates that representation by a guardian ad litem was a *sine qua non* of the majority's result.

The above descriptions apply to Amish society generally and are not specifically descriptive of the Amish community involved in this case. The source, Hostetler, *Amish Society*, is the one relied upon by the majority.

It is apparent, however, that the problem of having these "peculiar people"[2]/ in our society ought not be solved by fining them or sending them to jail if they choose not to conform to the usual religious mores of the state. While the record in this case is incomplete, it reveals a complete lack of any attempt by local or state officials to deal realistically or imaginatively with a difficult problem. In fact, there is strong evidence that the purpose of this prosecution was not to further the compelling interest of the state in education, but rather the reprehensible objective, under the facts of this case, to force the Amish into the school only for the purpose of qualifying for augmented state aids.

The points of view, however, are clearly reconcilable. The law requires that all children attend school until they are sixteen. The Amish object to the worldiness of the usual
195 high school. The writer of this dissent believes that both objections can be met by an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires.

In addition, such basic skills as English and mathematics should be taught—"unpretentious" knowledge that will be useful not only in the Amish community, but would better enable those who fall away from the community to adjust to the outside world and to continue their education if they so desire.

2/ Deuteronomy, ch. 26, verse 18; Titus, ch. 2, verse 14.

Such plans have been adopted in Pennsylvania, Ohio, and Iowa, usually only after gestapo tactics by school authorities outraged the non-Amish community into reaching reasonable alternatives. In Iowa, only the intervention of Governor Harold Hughes brought rationality and compassion to a reconciliation of the problem. The Pennsylvania plan offers schoolwork programs to Amish fourteen years or older who have completed eighth grade. In addition to classwork in English, mathematics, and hygiene, they are required to develop domestic and agricultural skills. In Iowa, schooling is required, but Amish schools need not meet the public school curriculum standards. A similar practice is followed in Maryland. In Indiana, Amish are encouraged by the state superintendent of schools to organize their own schools.

Hostetler[1/] points out that the enforcement of school attendance laws has resulted in the "professionalization" of Amish schools and that, as a consequence, nearly 200 Amish elementary schools and 50 Amish vocational schools (for post-fourteen-year-old students) were in operation in 1967. The plans recognize that Amish children will be better suited for the Amish way of life if they are educated to be productive
196 members of the Amish community. They also recognize the state's interest in education that will serve the children if they leave the community.

1/ This discussion of these alternatives relies largely on Hostetler, *supra*, pp. 193-203.

The alternatives, therefore, are not those that are posed in the principal opinion. Compulsory education until age sixteen is not necessarily "worldly" educaton. No part of our law requires a student to go to a school not of his own religious choice. It merely requires that he go to a school. There is no reason why the Amish community should not establish its own school—as the Amish have in other states—that will foster the Amish way of life. They may not, however, ignore the compelling interest of the state in educating their children. They may do as other religious organizations have done and establish their own schools and teach them basic skills and the precepts of their own religious beliefs and be in conformance with the law. Until they do so, they are subject to criminal penalties.

Neither the prosecutorial tactics of the school authorities nor the insensitivity of the principal opinion to the educational policies of the state and the personal liberties of these children are appropriate to the problem faced by the Amish.

Contrary to the conclusions of the opinion subscribed to by the majority of the court and authored by Mr. Justice Connor T. Hansen, I am satisfied that the state's compelling interest in universal education has been abundantly demonstrated.

I would affirm, but would stay execution of sentence for such period of time as is reasonably required to properly organize and to commence operation of an Amish vocational school. At the commencement of such operations, the judgment should be vacated and the complaint dismissed.

197 State Nos. 92, 93 & 94

August Term, 1970.

STATE OF WISCONSIN IN SUPREME COURT

State No. 92
STATE OF WISCONSIN,
Respondent,

v.

JONAS YODER,
Appellant.

State No. 93
STATE OF WISCONSIN,
Respondent,

v.

ADIN YUTZY,
Appellant.

State No. 94
STATE OF WISCONSIN,
Respondent,

v.

WALLACE MILLER,
Appellant.

CONNOR T. HANSEN, J. *(Concurring.)* I concur with the result reached in the opinion written by Mr. Chief Justice HALLOWS, but only to the extent that children of members of the Old Order Amish religion or Conservative Amish

Mennonite Church, living as members of the Amish community, should not be required to attend a school which meets the requirements of state law beyond the eighth grade.

Under the facts of this case, there has been an inadequate showing that the state's interest in establishing and main-
198 taining an educational system overrides the defendants' right to the free exercise of their religion. Consequently, I would hold that unless and until further experience indicates that so invoking the First Amendment poses a serious threat to the effective functioning of an educational system within the state, children of members of the religious order involved in this case should not be required to attend school beyond the eighth grade.

I am authorized to state that Mr. Justices WILKIE, BEILFUSS, HANLEY and R. W. HANSEN, join in this concurring opinion.

APPENDIX II

Excerpts from memorandum decision, County Court, Green County, Wisconsin.

"At the opening of the trial, Defendants moved for dismissal of the complaints in all actions on the grounds of unconstitutionality of Wisconsin Compulsory School Attendance Laws."

"CONSTITUTIONALITY OF WISCONSIN COMPULSORY SCHOOL ATTENDANCE LAWS AS TO DEFENDANTS

The principal issue on which Defendants base their defense is their contention of unconstitutionality of Wisconsin compulsory school attendance laws as applied to Defendants as members of 'Old Order Amish'. As established by the evidence in these cases, Defendants

have, as a substantial factor in their religious belief, a strong conviction that they cannot send their children to high school or any school of academic or secular learning after the children have completed the basic equivalent of an 8th grade education. They feel so strongly in this respect that they are convinced that not only do they jeopardize their own relationships with God, but also those of their children, if they permit such attendance.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment 1: Free Exercise of Religion

Amendment XIV: Due Process of Law

Wisconsin Constitution

Article I, Section 1: Inherent Rights of Man

Article I, Section 18: Freedom of Religion and Conscience"

"The Defendants' motion to dismiss the charges as involving an unconstitutional statute is denied."

Record page, 101, 104 & 123.

Excerpts from memorandum desicion, Circuit Court, Green County, Wisconsin.

"Hearing upon appeal for trial de novo to the Circuit Court from the judgment of the County Court of Green County, pursuant to Section 958.075, Wis. Stats., heard at the Courthouse in the City of Monroe, and submitted upon the stipulated record made in County Court, together with the original briefs and additional argument of counsel in all three cases as consolidated for trial."

"The defendants contend the Wisconsin compulsory school attendance law is unconstitutional as applied to bona fide members of the Old Order Amish religious

society, inasmuch as it is a substantial factor of their religious belief that they cannot send their children to high school or any school of academic or secular learning after the children have completed the basic equivalent of an 8th grade education. The record establishes that this sect feels so strongly in this respect that they are convinced that not only do they jeopardize their own relationship with God, but also those of their children, if they permit such attendance.

* * *

In challenging the constitutionality of Wisconsin's compulsory school attendance laws, defendants rely upon both the United States and Wisconsin Constitutions.

The United States Constitution provides in its 1st and 14th Amendments, respectively, in part, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .'"

"Nevertheless, without repeating the case authorities cited by the County Court, this Circuit Court also is obliged to conclude that the compulsory school statute still represents a reasonable and constitutional exercise of the governmental function of the state. . . ."

Record page 125, 126-127, and 129.

70 - 110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1536

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR RESPONDENTS IN OPPOSITION

This Brief is submitted in response to the Petition filed by the Petitioner State of Wisconsin praying that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin, made January 8, 1971, in this criminal proceeding.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin appears in 49 Wis. 2d 430 (1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Wisconsin Statutes Section 118.15(1) (the Compulsory School Attendance Law), as applied in this case, deprives the Respondents of religious liberty in violation of the Free Exercise Clause of the First Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, amendment I:

> "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ."

The pertinent provisions of the Wisconsin statute involved are set forth in the Petition at page 4.

COUNTERSTATEMENT OF THE CASE

On October 23, 1968, the School District Administrator of New Glarus District No. 1 filed criminal complaints in Green County Court, alleging, as to each of the Respondents, that, as the father of a child under the age of sixteen years, he had failed to cause such child to attend school (public or private) contrary to the requirements of the Wisconsin Compulsory School Attendance Law. Each of the Respondents (adherents of the Amish religion) entered a plea of not guilty.

Upon trial, the Respondents moved to dismiss the three complaints on the ground that the statute was unconstitutional as applied to each of the Respondents in that it deprived him of religious liberty guaranteed to him by the Free Exercise Clause of the First Amendment to the Constitution of the United States.. The motion did not attack the constitutionality of the statute on its face, but solely as applied to these Respondents.

On the trial the following facts were adduced and are uncontroverted:

That the three children (Freda Yoder, Barbara Miller and Vernon Yutzy) respecting whose nonattendance the complaints had been filed, were under the age of sixteen, being of the ages, respectively, of 15, 15 and 14; that each of the children had graduated from the eighth grade of the New Glarus Public [Elementary] School; that the Respondents had failed to enroll these children in New Glarus Public High School at the opening of the Fall, 1968, school term; that this failure was due to religious beliefs held by these Respondents; that there existed within the School District no private high school; that the three children were not enrolled in any private school, parochial or otherwise; that there was no disobedience or delinquency upon the part of any of the children in question; that none of the children in question had been exempted by the public authorities from attending school in the Fall, 1968, school term; that the New Glarus School Administrator had signed the complaint in this prosecution directly upon ascertaining that the Old Order Amish within his district had opened an elementary parochial school, with a resulting loss of state reinbursement to the New Glarus School District

of around $18,000; that the Respondents Miller and Yoder and their two daughters in question were members of the Old Order Amish religious sect and that Appellant Yutzy and his son Vernon were members of the Conservative Amish Menonite Church.

As to the last-mentioned fact, no evidence appears in the record that Respondent and the said children were not sincere in their claim that they believe in, and follow, the teachings of the Amish sect, and the State's attorney asserted that the State had "no objections to stipulating the defendants are sincere in their religious beliefs." Testimony of Dr. John A. Hostetler of Temple University, Philadelphia, whose qualifications as an expert witness on the nature of the Amish society were not challenged, brought out the following facts, uncontroverted in the record, respecting the teachings of the Old Order Amish[1] religion:

1. The requirement of a church community that is separate from the world.

2. Ethical obligations to help their brothers in the faith to achieve Heaven and involving practices of mutual aid and caring for their own people.

3. The binding character of the rules of the faith-community and that it is, as a matter of religious duty, obligatory upon the Amish parent to rear his child in the Amish way of life.

4. The necessity for attachment to the soil, expressed in the fact that the community is an agricultural society.

[1] Nothing was adduced upon the trial to show that the Conservative Amish Mennonite Church differs in its teachings from the Old Order Amish sect, and the trial court properly considered both under the general term, "Amish".

The same witness testified that these principles of the Old Order Amish religion dictate that the Amish child, from the inception of adolescence (the time of adult baptism) live according to the mode of life in the Amish community; that he should not attend a high school, since any high schooling constitutes, in Amish belief, a deterrent to salvation, in that it necessarily involves worldly learning, the substitution of values which are contrary to the Amish religion, and necessitates that the child choose between the ways and values of his parents and conflicting ways and values—resulting in psychological alienation and harm to the child; further, that the Amish adolescent does in fact receive, in the Amish community, an education, though one that is different from that accorded the majority of children.

State's witness, the New Glarus School Administrator, Kenneth J. Glewen, testified that the New Glarus High School encourages the competitive spirit through, *inter alia,* sports; that the teaching of the Ten Commandments is not part of that school's curriculum; that children at the New Glarus High School are encouraged to attend upon social activities, among which are dances; that "moral training" was afforded in that school in conjunction with education in health and general science, and that the ultimate source of law is that of a school administrator.

Defense witness, Reverend Reuben Hirschberger, an ordained minister of the Amish religion, testified to the necessity, according to Amish religious teaching, that Amish children, from eighth grade age on, should be taught the Amish way of life and not attend high school.

Defense witness, Wilbur E. Deininger, Sheriff in Green County from 1963 to 1967, Undersheriff in 1967 and 1968, and present member of the City of Monroe Department of Police, testified that, to his knowledge, no teenage members of the Old Order Amish group dwelling in Green County had ever been apprehended or arrested for crime or engaged in acts of violence.

Defense witness Ray F. Kaskey, for the past nine years Director of the Department of Social Services for Green County, testified that he knew of no Amish in the county who had been recipients of public assistance, had been unemployed or received unemployment compensation, had had illegitimate births, been residents of publicly suported homes for the aged, the indigent, the physically or mentally ill, or alcoholics. He further stated that the Amish people did not add to the social burdens which the taxpayers of Green County must bear, and that the fact that the Amish children do not attend high school has no effect in adding to the social burdens carried by these taxpayers.

One of the three children, Frieda Yoder, aged 15, testified that she believed in the Amish religion and that she desired to live according to the way of her people, the Amish way, and that going to high school would be against her religious beliefs.

Dr. Donald Erickson, of the University of Chicago, whose qualifications as an expert witness on the subject of education were not challenged, testified that it was his opinion that the Amish provide for their children what can be called an education, that it is a good education and that, as an educator, it was his opinion that the application of the Compulsory Attendance Law to Amish children of high school age would be psychologically harmful and of no value educationally.

Prior to the conclusion of trial, the defense introduced two further items of evidence, Defense Exhibit, No. 1, showing the efforts of the defense to obtain exemption, for the three children, from the Wisconsin Superintendent of Public Instruction, and the refusal of such granting of exemption (Defense Exhibit No. 1); and Defense Exhibit No. 4, a booklet, "Vocation on the Farm" containing a vocational educational program which program Respondent Wallace Miller testified was presently employed for children of the Respondents Miller and Yoder.

The trial court found each of the Respondents guilty, at the same time specifically finding that "the Wisconsin compulsory school attendance law *does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief . . .*" (Slip Op. 20. Emphasis supplied.) The Supreme Court of Wisconsin, on January 8, 1971, reversed, specifically holding that the application of the statute herein, to Respondents, violated their religious liberty as guaranteed to them by the Free Exercise Clause.

THE POSITION OF RESPONDENTS ON THE PETITION FOR CERTIORARI

Respondents believe that the decision of the Supreme Court of Wisconsin was correct and, indeed, a long overdue vindication of the religious liberty of an innocent people. Their sole alleged offense to Wisconsin has consisted of persevering in the ways of their utterly distinctive and ancient faith in the crucial matter of the educating of their young at the time of adolescence. For this Wisconsin has prosecuted the Respondent Amish fathers through criminal process, but having available the manifold resources of the

State to prove its point, Wisconsin was unable to show a scintilla of compelling state interest to justify its action.

The denial of a writ of certiorari would be appropriate herein. Respondents recognize, however, that the Court may be disposed to grant the writ, due to the fact that the highest court of the State of Kansas, faced with the same constitutional claim as had been made herein, reached a conclusion opposite of that of the Supreme Court of Wisconsin. *State* v. *Garber*, 197 Kan. 567 (1966), *cert. den.*, 389 U.S. 51 (1967). Should the Supreme Court of the United States be disposed to grant the writ, it will then have the opportunity clearly to affirm, under the law of the land, the principal of religious liberty declared by the Supreme Court of Wisconsin, based on the specific facts of this case. That declaration would give protection to the religious liberty af Amish people, wherever they reside in the United States, in the education of their young.

The Amish (and the closely related Old Order Mennonites) reside in nineteen states.[2] In nine of these states they have been subjected to prosecution for refusal to send their children to high school.[3] Some of the prosecutions have resulted in the imposition of fines, with seizure and sale of possessions of the defendants. The Amish response to legal harassment over education in many states has been to sell their farms

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[2] Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Virginia, Wisconsin. HOSTETLER, AMISH SOCIETY, 79 (1968).

[3] See Appendix A.

and move to other states, or even to Canada or Central America.[4] Public revulsion against the prosecutions in some states has resulted in state administrative accommodation or exemptive provisions in statutes.[5] Administrative accommodations, however, are subject to change as administrators change, while statutory exemptions can be amended or repealed. Thus in all states where the Amish reside (and indeed in all other states, to which they may conceivably move), a constitutional basis of their freedom to educate their own children of high school age has been established only in Wisconsin by virtue of the decision which is challenged in this proceeding.

Respectfully submitted,

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Attorneys for Respondents

[4] See Appendix A.

[5] See Appendix A.

APPENDIX A

Arkansas: Amish depart for British Honduras, due to concerns respecting religion in education. *See,* N. Y. Times, Dec. 25, 1966, 17.

Indiana: Following controversy over the education question, the State Department of Education entered into an agreement with Amish leaders providing for "vocational project" education (mainly agricultural) from the eighth grade until age 16. *See,* Articles of Agreement Regarding the Indiana Amish Parochial Schools and the Department of Public Instruction (Indiana Department of Public Instruction, Aug. 22, 1967).

Iowa: 1962: Eight Amish fathers given jail sentence for refusal to send children to schools staffed by state-approved teachers. *See,* CHRISTIAN CENTURY, Feb. 6, 1963, 186; followed by suit by county school superintendent against Amish parents to close Amish schools. Injunction denied but parents' status under compulsory attendance law left open. *Jorgensen* v. *Borntrager,* No. 22904, District Court, Buchanan Cy., Iowa (Dec. 20, 1962). 1963: Buchanan Cy. District Court rules that Amish children may not be exempted from attending schools taught by state-certified teachers. *See* A. P. dispatch, Phila. Inquirer, Aug. 28, 1964. 1965: Amish parents warned by authorities that state would sell confiscated farm produce and animals at auction for refusal to send children to public schools. Amish children at Hazelton pursued in cornfield by school officials and forced into public school. *See,* N. Y. Times, Nov. 23, 1965. 1967: Amish resistance continues. Gov. Harold Hughes proposes that legislature create two-year (annually renewable thereafter) exemption for religious groups established in Iowa for past ten years, whose basic beliefs conflict with state school requirements. Legislation adopted. *See,* N. Y. Times, July 8, 1967, 16; Iowa Code, § 229.2 (1967).

Kansas: In 1965 Kansas changed its compulsory attendance law so as to require, for the first time, formal educa-

tion up to age 16. A criminal prosecution was instituted against an Amish parent for refusing to send his daughter, who had completed the eighth grade but was under sixteen, to a public high school. The parent was convicted and fined, the conviction being upheld by the Supreme Court of Kansas. *State* v. *Garber,* 197 Kan. 567 (1966), *cert. den.,* 389 U.S. 51 (1967). In 1968 the attendance law was amended to provide an alternative to "regular public high school" for those groups with "religious objections". KAN. STAT. ANN. § 72-1111 (1968).

Kentucky: Four Amish fathers were prosecuted in Elkton for their violation (due to religious beliefs) of the state compulsory attendance laws. *See,* Todd County (Ky.) Standard, Nov. 16, 1967.

Michigan: Michigan's attempts to enforce its attendance laws upon Amish parents resulted in about one-half the Amish population leaving the state. After several exemptive bills (including one backed by Gov. Romney) failed of passage, the Michigan State Board of Education unanimously approved a resolution creating temporary exemption. *See,* Michigan Education News, Dec. 9, 1966. No definitive solution exists in this state.

Ohio: Since 1921 Amish parents have been arrested for failure to have their children in approved high schools, with penalties ranging from fines and jailings to deprivation of custody of children. Some of the prosecutions were frankly acknowledged to have been instituted because of prospective loss of state aid. *See,* Daily Record (Wooster), Dec. 19, 1960, and AMISH SECTARIAN EDUCATION, Research Report No. 44, Ohio Legislative Service Commission. (1960).

Pennsylvania: In 1937 the Amish petitioned the Commonwealth to have their children freed, on religious grounds, from compulsory school attendance beyond grade school. The school laws were amended accordingly in 1939, so that a child of at least fourteen years of age, having completed the highest grade of elementary school in his district could

receive a farm work permit if his reason was approved by the Superintendent of Public Instruction. Act No. 352 of 1939, P.L. 786, Sec. 1416. The attendance problem appeared settled until the fall of 1950, when, out of more than sixty applications sent by residents of Lancaster County, only one work permit was granted. Arrests and jailings followed upon the refusal of Amish parents to send their children to high school. See, [Lancaster] Intelligencer Journal, Sept. 27, 1950; *see, generally,* KRAYBILL, THE AMISH AND THE SCHOOLS OF PENNSYLVANIA (Eastern Mennonite College, 1970). In the successive prosecutions, some Amish parents were arrested as many as ten times. HOSTETLER, AMISH SOCIETY, 198 (Johns Hopkins Press, 1968). The Superior Court of Pennsylvania, in 1951, denied the claim of defendant Amish parents that enforced high school attendance violated the free exercise of their religion. *Commonwealth* v. *Beiler,* 168 Pa. Super. 462 (1951). After further confrontations, with the aid of Governor George Leader, an accommodation was administratively worked out, whereby Amish children of high school age would be permitted to perform farm and household duties under parental guidance in so-called "vocational schools" within the Amish community. *See,* Policy for Operation of Home and Farm Projects in Church-Organized Day Schools (Department of Public Instruction, Commonwealth of Pennsylvania, Oct. 5, 1955). This arrangement—purely administrative—has settled the problem in Pennsylvania down to the present.

Virginia: In 1970, eleven Old Order Mennonite parents, in the area of Dayton, applied for exemption of their high school children under a state statute providing for exemption from attendance "for reasons of conscience". VIR. STATS. ANNO. § 22-275.4. Criminal complaint was brought against the parents and, following trial in the County Court of Rockingham County, they were found guilty and a fine of five dollars a day imposed. Upon appeal and trial *de novo* in the Circuit Court of Rockingham County, the judgment

was reversed, upon statutory, but not constitutional, grounds. *Commonwealth of Virginia* v. *Wenger, et. al.*, (Cir. Ct. Rockingham County, Nov. 11, 1970). In December, 1970, the Rockingham County School Board stated that the board would probably be "faced with it [compulsory attendance of Old Order Mennonite high school children] all over again next fall." News-Record (Harrisonburg, Va.) Dec. 9, 1970.

Wisconsin: The prosecution of Amish parents in Wisconsin is amply set forth in this Memorandum.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1586

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF FOR THE PETITIONER

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July 15, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1536

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin (App. 127-153) is reported at 49 Wis. 2d 430, 182 N.W. 2d 539.

JURISDICTION

The Judgment of the Wisconsin Supreme Court was made on January 8, 1971 and a petition for a writ of certiorari was filed April 1, 1971, and was granted May 24, 1971. Jurisdiction of this court rests on 28 USC § 1257 (3).

QUESTIONS PRESENTED

The Supreme Court of Wisconsin has construed the Wisconsin Compulsory Attendance Law, sec. 118.15 Wis. Stats., 1969, to be repugnant to the free exercise of religion as guaranteed by the First Amendment to the United States Constitution. The questions presented are:

(1) Whether Wisconsin's compulsory school attendance law, in particular, secs. 118.15 (1) (a) and 118.15 (5), Wis. Stats., 1969, are constitutional despite respondents' claim that attendance of their children in any school beyond eighth grade would be a violation of respondents' right to worship freely as guaranteed to them by the First Amendment to the United States Constitution.

(2) Whether ruling of the majority opinion of the Wisconsin Supreme Court in *State v. Yoder, et al.*, 49 Wis. 2d 430, 182 N.W. 2d 539 (1970), making an exemption for the respondents and other members of their religious sect from the Wisconsin compulsory attendance law violate the prohibition against the establishment of religion as contained in the First Amendment in the United States Constitution.

(3) Whether the exemption is constitutionally required or whether an exemption granted respondents is properly within the perrogative of the state legislature to grant or withhold as it pleases.

(4) Whether the Wisconsin Supreme Court correctly applied *Sherbert v. Verner* (1963), 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, or whether it should have

applied *Prince v. Commonwealth of Massachusetts*, (1943), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645.

(5) Whether a minor child has a constitutionally protected right to an education superior to the claim of respondent parents that education of their children beyond eighth grade violates respondents' constitutional right to worship freely.

STATUTES INVOLVED

Sec. 103.67

103.67 Minimum ages in various employments. (1) No minor under 16 years of age shall be employed or permitted to work in any gainful occupation during the hours he is required to attend school unless he has completed the most advanced course of study available to him in the public schools as provided in s. 103.71; except that minors under 16 may be employed in agricultural pursuits as provided in s. 103.77 and in public exhibitions as provided in s. 103.78.

(2) No minor under 14 years of age shall be employed, or permitted to work in any gainful occupation at any time; except that minors under 14 may be employed in agricultural pursuits as provided in s. 103.77, minors from 12 to 14 may be employed during school vacations as provided in sub. (3) and in public exhibitions as provided in s. 103.78, boys of 13 may be employed in street trades and boys of 12 may be employed in house-to-house street trades, as provided in ss. 103.21 to 103.31, and boys 12 or over may be employed as caddies on golf courses if they use caddy carts.

(3) Minors from 12 to 14 years of age may be employed during the vacations of the public or equivalent school in the school district or city of their residence in and around a home in work usual to the home of the employer, provided such work is not in connection with or a part of the business, trade or profession of the employer and provided further that such employment shall not be specifically prohibited by any provision of sections 103.64 to 103.82 or by any order of the department.

(4) . Nothing in sections 103.64 to 103.82 shall be construed to apply to the employment of a minor engaged in domestic or farm work performed outside school hours in connection with the minor's own home and directly for his parent or guardian.

Sec. 118.15 (1) (a) Wis. Stats., 1969

118.15 Compulsory school attendance. (1) (a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

Sec. 118.15 (3)

(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.

Sec. 118.15 (4)

(4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

Sec. 118.15 (5)

(5) Whoever violates this section or files a false statement under s. 118.16 (1) may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both. In a prosecution under this subsection, if the defendant proves that he is unable to comply with the law because of the disobedience of the child in question, the action shall be dismissed and the child shall be proceeded against as delinquent under ch. 48.

Sec. 118.16 (1)

118.16 Truancy. (1) "Truancy" means any absence of one or more days from school during which the principal or teacher has not been notified in writing of the legal cause of such absence by the parent or guardian of the absent pupil, and also means intermittent attendance carried on for the purpose of defeating the intent of s. 118.15. The only legal causes for absence are those specified in s. 118.15 (3) and (4). Upon request of the truant officer, a statement from the local health officer or nurse or attending physician shall be submitted explaining the cause of the pupil's absence.

Sec. 118.16 (4)

(4) A truant officer may visit any place of employment in his locality to ascertain whether any minors are employed therein contrary to law. He shall require that the school certificates and lists of minors who are there employed be produced for inspection, and he shall report all cases of illegal employment to the proper school authorities and to the industrial commission. When a truant officer receives a report or learns by investigation or by personal observation that any child is unlawfully and habitually absent from school, he shall proceed immediately in accordance with sub. (5).

U.S. Const. Amend. I.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Wis. Const. art X, sec. 3

District schools; tuition; sectarian instruction. SECTION 3. The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.

SUMMARY OF ARGUMENT

Compulsory education laws have been in existence since colonial times. Massachusetts passed the first state compulsory law in 1852. At the present time all states except Mississippi and South Carolina have compulsory school attendance laws.

The decision of the Wisconsin Supreme Court holding that the Wisconsin compulsory attendance law is unconstitutional as applied to a claim of violation of religious freedom is contrary to all historical and legal precedent. There is not a single case, state or federal, supporting the decision of the Wisconsin Supreme Court. All cases, state and federal, support compulsory school attendance laws and declare them to be constitutional, as against the claim of violation of the constitutional guarantee of religious freedom.

The Wisconsin decision, while acknowledging the right of the state to compel measures to be taken to preserve the health of children as against a claim of religious freedom, ignores the right of the state to insulate a child from the disease of ignorance. It also ignores the concomitant right of the child to know. The Wisconsin court has erroneously created a broad constitutional right to conscientiously object to education. This ignores the fundamental historical and constitutional values that are responsible for the very existence of our country.

The Wisconsin Supreme Court, ignoring controlling legal precedent and historical values, and erroneously relying on *Sherbert v. Verner* (1963), 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, has determined that an individual, under a claim of religious belief, may decide to what extent he will comply with a state's compulsory school attendance law, and in balancing the interest of the state as against the religious claim of parents of Amish children, ignored the compelling interest that the state and the individual child have in education.

If a parent does not have the constitutional right to conscientiously object to military conscription of his minor child, he most assuredly does not have the constitutional right to conscientiously object to the education of his child beyond the eighth grade at some school, be it public or private. We must place at least the same constitutional values on our system of education that we place on military conscription of our youth. (See generally *Prince v. Massachusetts* (1943), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 and *Gillette v. United States* decided March 8, 1971, — U.S. —, 91 S. Ct. —, 28 L. Ed. 2d 168; 39 Law Week 4305).

ARGUMENT

I. Historical Development And The Common Acceptance Of Our Educational System As A Vital National Institution Demonstrates The Compelling Interest That The Nation Has In Its Creation And Maintenance.

Despite the fact that an educational system is a basic institution in any society and its establishment and maintenance are essential to the survival of that society, a majority of the Wisconsin Supreme Court in a concurring opinion held, simply and without elaboration, that there had been inadequate showing that the state's interest in establishing and maintaining an educational system overrides respondents' right of free exercise of their religion (App. p. 152).

It is a self-evident truth that our nation, indeed, our civilization, including freedom to worship, was not conceived nor has it survived in ignorance. As a matter of fact the idea of popular education as we know it precedes the revolutions of the seventeenth and eighteenth centuries that gave birth to modern western civilization. "Every major philosopher since Plato has written on education. . . . Every major political system from Athens on has had to see to the training of the young for the perpetuation of values it holds most dear."[1/]

On many occasions our national leaders and representatives have expressed the compelling interest that our society has in education. Thomas Jefferson wrote " . . . If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be. The functionaries of every government have propensities to command at will

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[1/] Lawrence Arthur Cremin, Horace Mann Lecture 1965, *The Genius of American Education*, University of Pittsburgh Press p. 1-3.

the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor can they be safe with them without information. Where the press is free, and every man able to read, all is safe. . . ."[2/] Again, in commenting on *Bill Seventy-Nine: A Bill For The More General Diffusion Of Knowledge*, Jefferson wrote: ". . . Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree. . . . the influence over government must be shared among all people."[3/]

The provisions of the Northwest Ordinances of 1785 and 1787 are another example of the nation's compelling interest in education. Article III of the Northwest Ordinance of 1787, provided, in part: "Religion and morality and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall be forever encouraged. . . ."[4/]

The fact that government control of education was established early in the history of the colonies is further evidence of this nation's compelling interest in education. This principle of government control of education set a precedent in American life which prevails today. After the separation of the church and state in the late eighteenth and early ninteenth centuries the right of the state to establish and maintain its own schools and grant privileges to private educational

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2/ *The Works of Thomas Jefferson*, Federal Edition, collected and edited by Paul Leicester Ford, 12 volumes, G. P. Putnam's Sons, New York 1905 vol. 11.

3/ *The Writings of Thomas Jefferson*, Saul K. Padover, Duell Sloan and Pierce, Inc. New York 1943 p. 667-670.

4/ W.S.A., Vol. 1, p. 770. See also Encyclopedia Britannica, 1956 edition, p. 681. The Ordinance of 1785 in providing for alienation of land reserved one section of each township for educational purposes.

agencies rested on sound legal precedent. *State of Illinois v. Board of Education*, (1948), 333 U.S. 203, 92 L. Ed. 649.

The pattern of control of education which prevails today had its origin in New England. It consisted, and still consists, of four main principles:

> ". . . the state could require children to be educated; the state could require towns to establish schools; civil government could supervise and control schools by direct management in the hands of public officials and funds could be used for the support of public schools."[5]/

Because of the growth of the democratic ideals, the dangers of ignorance became more apparent and the idea that education of all was clearly in the interest of all became acceptable.

Paralleling the development of the common school at this time were demands for public support of education. The fundamental argument for financial support again was the compelling interest that society has in education.

> "For if an individual fails to receive an education it is not he alone who suffers the consequences. Society too suffers, for in a subsequent limitation in knowledge and skills in getting knowledge, he is not helping the electorate to make the best possible decision."[6]/

Up to the present time Americans have experienced well over three hundred years of state control of education. In 1963-1964 there were approximately 37,405,000 children in

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[5]/ Freeman Butts and Lawrence A. Cremin, *A History of Education in American Culture*, Henry Holt & Co. New York, 1953, p. 103.

[6]/ Ibid. In seeking to gain support for public funding of education Jefferson wrote "the tax which will be paid for this purpose [education] is not more than the thousandth part of what will be paid for kings, priests and nobles who will rise up among us if we leave people in ignorance." Jefferson to George Wythe, August 13, 1786, Paul Leicester Ford Edition (Ed.), *The Writings of Thomas Jefferson*, (New York, Putnam 1894), vol. 4 p. 269. Quoted in *History of Education in American Culture* p. 202.

average daily attendance in secondary and elementary schools in this country. Actual enrollment was close to 42,025,000. Current expenditures and capital outlay amounted in this period to 16.6 billion dollars for about 6.5% of the gross national product.[7]/

The tasks of unifying and raising standards and of equalizing educational opportunity could not have been done without state control. However, considerable autonomy has always rested with local municipalities. This arrangement makes for a closer contact of the system with the people and tends to directly involve them in the important task of educating their children.

While the danger of deadening conformity is ever present, the best method of orderly and meaningful change is through the support of an informed and educated electorate. It is only in such difficult cases as the present one that this court is called upon to state and restate the essential role that education plays in the support and vivification of our civilization.

> "On the basis of prudence alone, no modern industrial nation can fail to afford everyone of its citizens a maximum opportunity for intellectual and moral development. And beyond prudence, there is justice. No society that calls itself democratic can settle for an education that does not encourage universal acquaintance with the best that has been thought and said."[8]/

And, in defining in constitutional terms the importance of education to the individual as well as its importance as a governmental function, this court has stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for

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[7]/ *Standard Education Almanac*, 1969, Alvin Renetzky, et al. Editors (Academic Media, Inc., Los Angeles, California) tables 59, 60, and 34.

[8]/ *Cremins, The Genius of American Education*, p. 47-48.

> education both demonstrate our recognition of importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . ." *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873.

Viewing then, popular education in the school as vital to the perpetuation of society, one can accept the extension of the common school idea to the point where it embraces compulsory education for all children in some school whether it would be public or private. Education provides the intelligent electorate with leadership necessary to successfully run our government. Education assuredly helps to prevent crime and provide for the well-being and contentment of members of society.[9/] The state therefore has a right under its police power and the doctrine of *parens patriae* to compel school attendance.

That Wisconsin and the nation have a compelling interest in the establishment and maintenance of a system of education is clear beyond all doubt. It is likewise clear beyond all doubt that this interest overrides the religious interest of the parents of children whose attendance at some school, public or private, is required.

> "True parental freedom can only be based on the parent discharging his full responsibility to his child. Clearly, the child has a right to an education:"[10/]

[9/] History of Education in American Culture p. 357. See also *Prince v. Mass.*, infra.

[10/] Ibid., p. 357

II. Amish Customs And Behavior

The Amish are a pious, industrious and thrifty people, living in small agrarian groups in twenty states and the Canadian Province of Ontario. They are of Anabaptist origin, originally springing from the Mennonite Church under the leadership of Jacob Ammon. They practice adult baptism, nonresistance and refuse to bear arms, to swear on oath, and they refrain from holding public office. *Commonwealth v. Beiler* (1951), 168 Pa. 462, 79 A. 2d 134.[11/]

The goals of Amish life are never stated as matters of doctrine. They abide by acts which make up living in a small society. With them, custom tends to become sacred, behavior is strongly patterned and acts as well as cultural objects are given symbolic meaning. Religion is diffuse and all pervasive.[12/]

Thus, while rules of the Amish Church cover the whole range of human experience, custom is regional. The most universal customs are: "no electricity, telephones, central heating, authomobiles or tractors with neumatic tires; required are beards for all married men, long hair parted, if at all, in the center, hooks and eyes on dress coats and

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11/ John A. Hostetler, Amish Society, Rev. Ed., (John Hopkins Press) p. 6.—"The author himself is not only part of the Amish story but part of the irrevocably changing of the America which comes in some measure even to separatists such as Amish. Born a younger child of an Amish family which was later to be excommunicated largely because of the father's allegedly worldly pride in a fine registered dairy herd, he was socialized to the norm which taboos education beyond the 8th grade. He is now the holder of a Ph. degree in sociology. . . . " ibid., Introduction, p. xvii. See also, Ibid. p. 49.

12/ Ibid. p. 6.

the use of horses for farming and travel. No formal education beyond elementary grades is the rule of life."[13]/ These and other rules or customs are called the *Ordnung*. Those who deviate are subject to excommunication and "shunning." This means that a person who is shunned not only breaks with the belief of the community but also his relatives including his own family. The ban becomes an effective means of dispensing with the offender. By shunning him in all social relations, he is given a status that minimizes the threat to other members of the community. The desire for formal education is one of the factors associated with individual deviation.[14]/

The large number of Amish children are an asset to the Amish farm economy which needs more hand labor than the farm operated by tractor and other machines.[15]/ The child begins to assist his Amish parents at the age of four.

It was only gradually and with reluctance that the Amish complied with attendance requirements through the eighth grade.[16]/ What really brought the conflict into the open has been school consolidation and compulsory education after which period the children have completed the elementary grades. Amish parents have always feared a strong progressive public school for they fear that its aim is to make the child self-sufficient and competent, and perhaps moral without being Christian. They fear what is being taught to their children when they are far away from home by teachers whom they don't know. They resent the schools taking too

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[13]/ Ibid. p. 61
[14]/ Ibid. p. 65
[15]/ Ibid. p. 82, 155
[16]/ Ibid. p. 194

much time away from the family, from the community and from the discipline of farm work. Learning or reading for sheer enjoyment and pleasure is foreign in Amish tradition and not encouraged by most parents.[17]/

However, large numbers of young people voluntarily may leave the Amish community each year and are thereafter forced to make their way in the world (dissenting opinion) (App. 147, 110):

As the dissenting opinion pointed out:

> ". . . By not enforcing the school attendance law, the state of Wisconsin has consigned these young people to a future without any choice or goal except those of the traditional Amish life. They are abandoned without the intellectual tools to survive should they elect to leave the Amish way of life.
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> "The traditional Amish life has its attractions, but ought this court, by depriving Amish children of all but a bare eighth grade education, block for all time all other avenues for them. This is the effect of this decision. On the basis of the religious beliefs of their parents, the Amish children are without a hearing consigned to a life of ignorance — . . . Unmentioned is the tragic side of Amish life: 'Drinking . . . has become problematic' (Hostetler, *Amish Society,* p. 282); 'Rowdyism and stress' (p. 281); 'Preoccupation with filthy stories' (p. 282); 'Drinking is common in all large Amish settlements' (p. 283); 'It would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation.' It is highest among young men (p. 300). Amish society is perhaps but another miscrocosm of society — some of it is good and some bad. It is a cross-section of good and evil influences that pervade any society. But the children's denial of education ought not be justified on the mythological basis assumed by the principal opinion." *State v. Yoder* (1971), 49 Wis. 2d 430, 452-453, 182 N.W. 2d 589. (Footnote omitted).

[17]/ Ibid. p. 197

III. The Decision Of The Wisconsin Supreme Court Ignores The Substantive Right Of A Child To An Education.

In failing to recognize substantive right of a child to an elementary and secondary education, the Wisconsin Supreme Court has ignored and misinterpreted well-known cases and familiar principles of law (App. 127). In *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, the court based its holding on the importance of the right of a child to a basic education and held that the denial by the state of that right constituted denial of equal protection of the laws. Similarly, the Amish child is being denied this right by the theocratic society into which he was born. Any desire for knowledge is stifled and deviation incurs the punishment of "shunning."

Regardless of his ability or desires, the young adult Amish has only two alternatives: To join the Amish church at the age of between sixteen and twenty, or to make his way in the other world with only an eighth grade education.

The court again misconstrues the facts and the law when it states that prior to reaching "the age of judgment, . . . the state in its capacity of *parens patriae* ought not to enforce educational requirements which will directly influence or will destroy his choice of religion." (App. p. 135).

The law is clear that the state does have the right to compel attendance at public or *private* schools. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. Therefore, compulsory education need not "destroy" a choice of religion. The Amish may establish their own secondary schools consistent with their religious beliefs.

> ". . . This Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of Pierce v. Society of

> Sisters, [citing case], the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality in nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. *Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. . . ." Board of Education v. Allen* (1968), 392 U.S. 236, 245, 88 S. Ct. 1923, 20 L. ed. 1060.[18]/ (Emphasis ours).

In *Everson v. Board of Education* (1947), 330 U.S. 1, 18, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392, this court stated:

> "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose."

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[18]/ See also *Meyer v. State of Nebraska* (1923), 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; cf., *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 405, 72 S. Ct. 777, 96 L. Ed. 1098, 1108, where the court stated, "the state has no legitimate interest in protecting any or all religions from views distasteful to them."

The right of the state to compel secondary education at some school extends to the child a benefit. This is graphically illustrated by the statistics showing, for example, that people having one to three years of high school education have significantly higher lifetime incomes than those having only an eighth grade education.[19]/ Of course, there are other intangible but nonetheless real benefits to the individual who has an education beyond eighth grade.

It is not, as the Wisconsin Supreme Court has said, "a case of forcing a worldly education on all Amish children, the majority of whom do not want or need it in order to confer a dubious benefit on a few." (App. 135). It is an important benefit and consequently a right which every child has. If the Amish do not want to establish secondary schools for their children, then their children should be required to go to a more "worldly" public secondary school. In failing to provide for secondary education for their children, the Amish are

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Table 23 LIFETIME AND MEAN INCOME OF MALES 25 YEARS OLD AND OVER, BY YEARS OF SCHOOL COMPLETED: SELECTED DATES, 1956-1966

[Prior to 1961, excludes Alaska and Hawaii. Includes members of the Armed Forces living off post or with their families on post, but excludes all other members of the Armed Forces. Figures for lifetime income based on application of appropriate life tables to arithmetic mean income, by age, as obtained for a cross section of population in each year shown. Figures for mean income based on Current Population Survey]

Years of school completed	Lifetime income ($1,000)				Annual mean income			
	1956	1961	1965	1966	1956	1961	1965	1966
ELEMENTARY								
Less than 8 years	122	142	159	174	$2,574	$2,998	$3,283	$3,520
8 years	166	192	216	228	3,631	4,206	4,663	4,867
HIGH SCHOOL								
1 to 3 years	189	223	252	270	4,367	5,161	5,905	6,294
4 years	228	257	297	320	5,183	5,946	6,899	7,494
COLLEGE								
1 to 3 years	268	325	353	381	5,997	7,348	8,133	8,783
4 years or more	359	437	482	520	7,977	9,817	10,823	11,739

Source: U. S., Bureau of the Census, *Statistical Abstract of the United States 1968*.

neglecting a parental duty and obligation to their children and neglecting their duty as citizens of a democracy from which they have reaped ample benefit.[20]/

To dispose of the right of a child to a secondary education as "a dubious benefit" is a strange disregard of historical fact and legal precedent.

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states . . . enforce this obligation by compulsory [attendance] laws." *Meyer v. Nebraska* (1923), 262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042.

In determining constitutionally valid legislation permitting children to be transported to private schools at taxpayers expense, and legislation furnishing textbooks at taxpayers expense to children attending private as well as public schools, and the right of children to attend desegregated schools, this court has never left in doubt the fundamental importance with which it regards education and the individual's right thereto. *Everson v. Board of Education* (1947), 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, *Board of Education v. Allen,* supra, *Brown v. Board of Education,* supra, *Cooper v. Aaron* (1958), 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, and *Griffin v. County School Board of Prince Edward County* (1964), 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256:

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[20]/ See generally, *History of Education in American Culture.* cf, *Amish Society.* See also, *Reynolds v. United States* (1878), 98 U.S. 145, 166, quoting Thomas Jefferson's address to the Danbury Baptists to the effect that "man has no natural right in opposition to his social duty."

> "History and custom have now established the assumption that everyone will receive some education to be provided by the state if no one else. . . . Education has come to be recognized as a critical interest similar to those involved in voting and criminal process, necessary to a meaningful participation in human society and in the benefits which it offers.[21]/

The Amish children are being deprived of that right just as surely and effectively as were the Black children prior to the implementation of *Brown I.* The Amish must take cognizance of this right and concomitant duty to provide a secondary education for their children in schools which are satisfactory to their religion or else send them to the public schools.

IV. The Wisconsin Compulsory School Attendance Law Is Constitutional As Against The Claim Of Respondents That The Right To Worship Freely Would Be Constitutionally Violated If They Are Compelled To Send Their Children To A Secondary School.

A. The decision of the Wisconsin Supreme Court is contrary to all authority on the subject.

The decision of the majority of the Wisconsin Supreme Court is in direct conflict with the decisions of the United States Supreme Court and numerous state jurisdictions dealing with the subject (App. pp. 120, 127). In *Prince v. Commonwealth of Massachusetts* (1943), 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645, this court, in ruling that an individual's religious belief could not constitutionally obviate the state child labor law, stated at p. 165-166:

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[21]/ See: Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1183.

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U.S. 145, 25 L. ed. 244; *Davis v. Beason* (1889), 133 U.S. 333, 33 L. ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by *requiring school attendance,* regulating or prohibiting the child's labor, and in many other ways. . . . (Emphasis added.)

"* * *

"The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. . . ."

The Wisconsin Supreme Court erroneously interprets *Prince* as being more concerned with public safety (App. 135). It is not public safety as such, but the welfare of the child about which *Prince* is concerned.

The child labor laws referred to in *Prince* and the compulsory attendance laws are correlative and spring from the same concern for the welfare of the child. This common relationship is well documented historically.[22/]

[22/] Lawrence A. Cremin, The Transformation of the School, Alfred A. Knopf, New York (1961) p. 127. "Massachusetts passed the first statewide compulsory-attendance law in 1852; Mississippi was the last of the states to pass one, in 1918. During the interim educational reformers learned some painful facts of political life. They discovered, among other things, that passing a law does not necessarily get children to school; that in the absence of proper statistical records there is no way of knowing in the first place whether or not children are attending; that without effective enforcement procedures the very children the law is designed to coerce escape its beneficent influence; and that without correlative measures regulating child labor and employment a compulsory attendance law is a sham, unenforceable and ultimately meaningless." See also Steinhilber & Sokolowski, *State Law on Compulsory Attendance,* H.E.W., Office of Education, page 3,4: "Child labor and school census laws are closely allied to compulsory school attendance laws. . . . Enforcement of the compulsory school attendance laws with stricter youth employment statutes, more effective accounting procedures, and school census laws have led to dramatic growths in school enrollment. . . ."

Modern state statutes reflect this correlation. The Wisconsin child labor law prohibits the employment of a minor under age of 16 during hours he is required to attend school.[23]/

History, custom and logic make it clear that it is not possible to have one regulatory statute dealing with compulsory education and not have a regulation dealing with child labor. The point then is clear that *Prince v. Massachusetts* applies not only to child labor, but also to compulsory school attendance laws.

This principal of *parens patriae,* as applied to minors in *Prince,* was reaffirmed in *Ginsberg v. State of New York* (1968), 390 U.S. 629, 88A S. Ct. 1274 (reh. den.), 20 L. Ed. 2d 195, 391 U.S. 971, 88 S. Ct. 2029, where this court, after citing *Prince* with approval, stated that "the well being of its children is, of course, a subject within the state's constitutional power to regulate. . . ."

Nonetheless, the Wisconsin Supreme Court erroneously views this case "as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates." (App. 133).

The Wisconsin court further misconstrues *Re Gault* (1967), 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, as diminishing the doctrine of *parens patriae.* This case actually expanded the right of the minor to *procedural* due process. It did not weaken, but, if anything, strengthened the role of *parens patriae* in protecting minor's substantive rights and well being.

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[23]/ See sec. 103.67, Wis. Stats., and sec. 118.15, Wis. Stats. See also *Commonwealth v. Smoker* (1955), 177 Pa. Super 435, 110 A.2d 740.

In addition, the several states that have ruled on compulsory education have unanimously held them to be constitutional as constituting a valid exercise of the police power of the state and the doctrine of *parens patriae* to protect the best interests of society by securing to its children the opportunity to acquire an education. Cases involving the Amish are: *State v. Garber* (1966), 157 Kan. 567, 419 P. 2d 896, *cert. den.* 389 U.S. 51, 88 S. Ct. 236, 19 L. Ed. 50; *State v. Hershberger* (1955), 103 Ohio App. 188, 144 N.E. 2d 693; *Commonwealth v. Smoker* (1955), 177 Pa. Super 43, 110 A.2d 740; *Commonwealth v. Beiler* (1951), 168 Pa. Super 462, 79 A.2d 693.[24]/

There is no case or precedent to support the holding of the Wisconsin Supreme Court that the Wisconsin compulsory attendance law is unconstitutional as applied to the respondents.

> "A parent does not have a right to withhold his child from all secular schooling or from secular schooling that he thinks is religiously detrimental. But he does have a right to send him to a religious school which meets the requirements of the state's education laws. Religious societies have a right to operate such schools. Parents may not inculcate religion by practices which violate school attendance laws — even to observe their Sabbath or religious holidays — or child labor laws."[25]/

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[24]/ Other cases upholding the compulsory school attendance laws are: *Commonwealth v. Bey* (1950), 166 Pa. Super 136, 70 A.2d 693; *Rice v. Commonwealth* (1948), 188 Va. 224, 49 S.E. 2d 342; *Marsh v. Earle* (1938), 24 F. Supp. 385, 14 A.2d 368; *Stephans v. Bongart* (1937), 15 M.J.M. 80, 189 A. 131; *State v. Williams* (1929), 370, 228 N.W. 470; *Parr v. State* (1927), 177 Ohio 23, 157 N.E. 555; *DeLease v. Noland* (1918), 185 App. Div. 82, 172 N.Y.S. 552; *State ex rel. O'Bannon v. Cole* (1909), 220 Mo. 697, 119 S.W. 424; *State v. Jackson* (1902), 71 N.H. 552, 53 A. 1021; *State v. Bailey* (1901), 157 Ind. 324, 61 N.E. 730.

[25]/ Galanter Religious Freedoms, 1966 Wisconsin Law Review, 217, 299.

B. The Wisconsin Supreme Court erred in applying *Sherbert v. Verner* in granting a non-statutory exemption to the respondents.

Having erroneously concluded that it may ignore the fundamental right of a child to know, the Wisconsin court proceeded to carve out an exemption to the Wisconsin compulsory education law without any consideration being given to the manifest compelling interest of the state in education.

In the recent case of *Gillette v. United States*, U.S. , 91 S. Ct. , 28 L. Ed. 2d 168 (March 8, 1971), this court interpreted a statute creating a conscientious objector status in the military conscription laws. The court held that to achieve such a status one must object to all wars and not merely a particular war. There is more than a superficial resemblance of this case to the present case.[26]/ The court has apparently accepted the language of *United States v. McIntosh* (1931), 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302, and other cases to the effect that there is no non-statutory exemption from military conscription.[27]/

The Wisconsin court was then in error when it imposed on education a constitutional value of far lesser importance by holding that the United States constitution does provide for an exemption from compulsory education. It is submitted that such a constitutional exemption does not exist.

In the *Gillette* case, the exemption was created by statute. In Wisconsin, the exemption was created by the court. The exemption granted by the Wisconsin court is as follows:

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[26]/ i.e., the Amish do not object to all education, only education beyond the 8th grade.

[27]/ *Gillette v. United States*; see cases cited in footnote 23.

> ". . . [C]hildren of members of the Old Order Amish religion, . . . living as members of the Amish community, should not be required to attend school which meets the requirements of state law beyond the eighth grade." (App. 152).

Assuming for sake of argument that the latter course of action may be validly accomplished, the exemption, as granted, is subject to the objection voiced in *United States v. Seeger* (1965), 380 U.S. 163, 188, 85 S. Ct. 860, 13 L. Ed. 2d 733.[28]/

To be constitutionally valid, the exemption must extend to all individuals the right to assert, under a claim of religious belief, what degree of compliance there must be with compulsory school attendance laws.

The necessary effect of the Wisconsin decision, therefore, is to create a broad constitutional right to conscientiously object to education rather than a narrow exemption for a particular religion. This broad scope of selective exemptions necessitated by the decision, however, was precisely what petitioners in *Gillette* argued for. This court rejected the concept. In doing so, it held that "Its analysis . . . has revealed governmental interest of a kind and weight sufficient to justify under the free exercise clause the impact of the conscription laws on those who object to particular wars." *Gillette v. United States* (1971), U.S. , 28 L. Ed. 2d 168, at p. 187. It is precisely this analysis concerning the kind and weight of governmental interest, as well as the

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[28]/ See concurring opinion of Justice Douglas in *United States v. Seeger*, at p. 188, to the effect that a statute in exempting conscientious objectors from military service which would embrace one religious faith rather than another violates the free exercise clause of the First Amendment and results in the denial and equal protection by preferring some religions over others and further, that it is an invidious discrimination violating due process clause of the Fourteenth Amendment. See also *Dalli v. Board of Education* (1971), — Mass. App. Div. —, 267 N.E. 2d 219.

weighing of the interest of the child that is lacking in the Wisconsin decision. The interests of the state in education are at least as important as the Federal government's interest in conscription laws.

Furthermore, in *Sherbert,* there were only 2 of 150 Seventh Day Adventists, that were unable to find suitable employment. In the present case, at the very least, the children of 50,000 Amish parents are involved plus an undetermined number of non-Amish throughout the nation who could argue that because of their similar conscientious beliefs, they are entitled to equal protection of the laws and that their children are therefore entitled to an exemption from compulsory school attendance.

The Wisconsin Supreme Court has overextended the doctrine of the *Sherbert* case.

> ". . . The Sherbert case at most would relate to a shared time arrangement, that is, a plan making the public education program available to those whose religious convictions inhibit them from full time attendance at a public school. . . ."[29]/

C. The exemption granted by the Wisconsin Court violates the establishment clause.

While the compulsory attendance law fulfills the requirement of the establishment clause that the constitutional value of neutrality be observed, this is not true of the exemption which the court has granted to the Amish. This exemption is not "secular in purpose, even handed in operation and neutral

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[29]/ Paul A. Freund, *Public Aid To Parochial Schools,* 82 Harv. L. Rev. 1680, 1688.

in primary impact." *Gillette v. United States* (1971), U.S. , 28 L. Ed. 168, 181. In addition, the effect is "an excessive degree of governmental entanglement." *Walz v. Tax Commission of New York City* (1970), 379 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697. This is because of the wide variety of the beliefs, conditions of membership and the theological concepts of community as opposed to natural geographic limitations of the community, which membership in the Amish community involves. The administrative authorities in the State of Wisconsin, for example, would have a great deal of difficulty in determining the status of Amish in their community as well as their particular beliefs. Their attempt to comply with the mandate of the Wisconsin Supreme Court would constitute "excessive entanglement." This is particularly true because "there is lack of unanimity among the members of the Amish communities in Wisconsin as to their attitudes toward public education which may make it . . . certainly difficult to devise specific proposals exempting them from school policies and requirements."[30]/ . . . .

D. Administration of benevolent neutrality should be the exclusive right of the legislative branch.

It seems clear that if the exemption granted the Amish is not a constitutional right then it is an exemption which must, of course, have the approval of the legislature. To arrive at a constitutionally valid application of the principle of benevolent neutrality is primarily a function of the legislature. Such matters as exemption of religious bodies from taxes or laws concerning education are within the exclusive power of the

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[30]/ Wisconsin Legislative Counsel Staff Report to the Education Committee on the Amish Community in Wisconsin and Selected Other States. Legislative Reference Library, State Capitol, Madison, Wis., p. 29.

legislature to grant or withhold as it desires. Religious bodies, for example, have not a constitutional right to a tax exemption but one may be granted without violating the establishment clause. By the same token, children are not constitutionally entitled to free textbooks when they attend private schools even though the same may be furnished to public school children free. However, the legislature may again grant or withhold this right without violating the First Amendment. So, in the present case, it may either exempt the Amish or withhold such an exemption as it choses. As a matter of fact, the Wisconsin legislature recently considered and rejected an attempt to accomodate the Amish through modification of the compulsory attendance law.[31]/ However, this does not mean that the legislature may not at some future time review this matter and, in the light of changing values in education, respond to an informed electorate by enacting the legislation which will satisfy both the compelling interest of the state, the interest of the child and the Amish.

The Wisconsin decision does none of these. It neither satisfies the compelling interest of the state or the interest of the child, and as far as the Amish are concerned, it applies on its face only to members of the Old Order Amish.

Clearly, the right to deal with the matter should be left in the hands of the legislature as has been the case in Pennsylvania, Ohio and other states where Amish reside.

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[31]/ See Wisconsin Legislative Counsel Staff Report, p. 3.

CONCLUSION

Surely, the State has as great, if not greater, an interest in the education of its children as it does in preventing polygamous marriages as against the assertion that such State interest must yield to the right of an individual to elect what law he will obey under a claim of freedom of religion. See *Church of Jesus Christ of Latter Day Saints v. United States* (1889), 136 U.S. 1, 10 S. Ct. 792, 34 L. Ed. 478; *Davis v. Beason,* supra, and *Reynolds v. United States,* supra.

The judgment of the Wisconsin Supreme Court sets dangerous and erroneous precedent and for that reason, should be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

Supreme Court, U.S.
FILED
AUG 30 1971
E. ROBERT SEAVER, CLERK

~~No. 1536~~

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JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*
vs.
ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*
vs.
WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The General Conference of Seventh-day Adventists has asked for and received the consent of both the appellant and appellee to file its brief *amicus curiae*. It does so not from any fear that the parties themselves will fail to effectively present their case before this high court, but

rather to underscore the fact that the decision in this case affects more than the State of Wisconsin and its Amish citizens.

A careful reading of the Questions Presented as set forth in appellant's Brief clearly indicates that the determination of the issues there presented directly affect the rights of all parents to determine the religious upbringing of their child. It further suggests that minority religious bodies may be forced to move from one state to another to find a haven for the free expression of their religious beliefs. This *amicus curiae* feels that the questions herein raised are of vital concern to, and directly affect the members of its church.

SUMMARY OF ARGUMENT

The State has made assertions of authority that place in jeopardy the right of a parent to control the religious upbringing of his child. Such a position conflicts with the free exercise provision of the First Amendment of our Federal Constitution.

This Court has on several occasions held that when state or federal legislation conflicts with First Amendment Constitutional rights the state has the burden of showing that any such governmental infringement be justified by some compelling governmental interest.

In order to sustain its burden, the State must present to the Court sufficient evidence as to demonstrate that the interest of the government is in fact, and not merely in theory, substantial.

As this Court has announced, only the gravest abuses endangering paramount interests will permit such state infringement.

The State has attempted to sidestep their evidentiary burden by claiming that the doctrine of *parens patriae* somehow minimizes the government's burden of meeting the tests laid down by this court in religious exercise cases.

Such a position as claimed by the State in its application of *parens patriae* implies the desire on the part of the

State to employ concepts of state power reminiscent of sixteenth century English religious intolerance.

The courts in this country have long recognized the right and duty of a parent to teach his child moral values and further recognize that the parent has a compelling overriding interest in training and instructing the child according to the parent's religious precepts. This parental right can not be taken lightly or quickly ignored.

The family is the basic unit of government and its breakdown in our society is acknowledged as a major cause for our youth problem. A child should not, except for the gravest causes, be forced to make the psychologically harmful decision of disobeying the religious precepts of his parent who is charged with the sensitive responsibility for moral and spiritual training of the child.

Under a government where the State is prohibited from engaging in the religious instruction of its young people the spiritual need of these children can only be met by the parent. The denial to a parent of the right to control the religious upbringing of his child is a denial of the parent's right to the free exercise of his religion.

The State Supreme Court correctly held that although education is a subject within the power of the State to regulate, based on the record in this case however, there was not such a compelling interest shown to justify the burden it placed on the free exercise of religion by the Amish. The Court therefore declared the state's compulsory attendance law unconstitutional as to these individuals.

The State claims that the Amish should not have obtained relief from the Court but should have been left to the unpredicable fickle mercy of a legislature. This concept however, ignores the right of a person to live and practice his religious views in any state provided no overwhelming governmental interest is violated.

Based on the record in this case the Wisconsin Supreme Court correctly applied the tests set forth in *Sherbert v. Vernor* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965.

ARGUMENT

I. The Parent Has A Right And Duty To Determine The Religious Upbringing Of His Child

A. The State's position conflicts with constitutionally protected rights

The State of Wisconsin has, on page 4 of its brief, stated one of the issues before this court to be:

> "Whether a minor child has a constitutionally protected right to an education superior to the claim of respondent parents that education of their children beyond eighth grade violates respondents' constitutional right to worship freely."

On page 14 of its brief the State answers its rhetorical question by the flat assertion that:

> "Wisconsin and the nation have a compelling interest in the establishment and maintenance of a system of education" and "It is likewise clear beyond all doubt that this interest overrides the religious interest of the parents of children whose attendance at some school, public or private, is required."

The State however does not protest the Wisconsin high court's statement:

> ". . . There is no question that, found by the trial court, the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the First Amendment." *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 542.

It is therefore clear that the State is arguing that its interest in compulsory education is superior to the constitutional First Amendment rights of respondents.

Such a declaration is disturbing to all who jealously oppose the State's invasion into matters of religious concern,

and defenders of individual constitutional rights surely view such a statement with alarm when comparing it with the First Amendment mandate that there shall be no law "prohibiting the free exercise" of religion.

The State's declaration makes clear its position that in matters concerning compulsory education, the will of the majority shall control over the conscientious religious beliefs of an individual.

Such a position would have surely shocked James Madison who stated that:

> "Because we hold it for a fundamental and undeniable truth, that religion, or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The religion, then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men. It is unalienable, also, because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation; to the claims of civil society."[1]

The State has rested its argument on "historical and constitutional values that are responsible for the very existence of our country" and so do we. The historical and constitutional values of the doctrines that are embodied in our First Amendment Freedoms are the very cornerstones of our nation and the real cause for its existence. It was for the defense of the unalienable rights of man that we broke from the British Crown.

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1. Writings of James Madison, published by Order of Congress, (Philadelphia, 1865) volume i, page 162 et seq.

B. The State cannot ipso facto substitute its will for the will of the child or his parent

The State has in its brief (page 9) suggested that the decision of the State Supreme Court "Ignores the right of the state to insulate a child from the disease of ignorance" and in addition "ignores the concomitant right of the child to know."

One may well ask, however, when and at what point does the state have a right to interpose itself between the child and his parent, and what exactly does the child have a constitutional right to know?

It may seem rather strange that an educational oriented religious organization such as the Seventh-day Adventist Church should seek to file a brief in support of the Amish position against compulsory education. The Seventh-day Adventist Church, although relatively small in size, is strongly committed to education from the first grade through college and professional school.[2] It is therefore readily apparent that its position more closely follows the prevailing notions of society as far as secondary education is concerned.

The State has, however, made a serious and potentially dangerous attack on the parental jurisdiction over the religious upbringing of their children.

Although the State has attempted to predicate its declaration of a child's right to know upon the authority of *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, it is clear that the dicta of this case, viewed in its proper perspective, merely confirms the right of the representative of a minor to insist that the State provide to every child equal education and equal access to all public educational facilities.

In the case now before the Court the State seeks something entirely different from that contemplated in the

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2. The Seventh-day Adventist Church has a world membership of 2,051,864 and operates 4,045 elementary schools, 398 high school level schools, 77 colleges and universities and 37 schools of nursing.

Brown decision. Here the State claims the right, under the doctrine of *parens patriae* to intercede for and on behalf of the children whose parents were prosecuted by the State.

In the instant case it is clear that neither the parents nor legal guardians of the children were seeking to force the State to provide access to certain public educational facilities. It is also true that the children neither asked for nor otherwise sought the State's help. This is purely and simply a case where the State sought to substitute its will for that of the child's parents.

Even in *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, the Court was careful to point out that:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. 166.

As noted by the New York Appellate Court in *People ex rel Session* 271 N.Y. 285, 2 NE 2d 660, 661 (1936):

> "The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self restraint of father and mother . . . Only when moral, mental and physical conditions are so bad as seriously to affect the health or moral welfare of children should the courts be called upon to act."

It therefore becomes clear that the State cannot by the mere use of such magic words as *"parens patriae"* ipso facto determine that the State's concept of child benefit be substituted for either the will of the child or his parent.

C. Courts have recognized the right of the parent to determine the religious upbringing of his child

While the State's authority over the will of minors under its jurisdiction is severely limited by legal precedent in this country, the broad powers of the minor's parent have been given recognition.

Not even the State of Wisconsin has suggested that the doctrine of *parens patriae* is a grant of general and absolute power to the State over its minor subjects such as exercised by the Spartans. Its primary use is to protect children from neglect, ill-treatment and abuse.

It is submitted that where the issue has been as to the religious upbringing of a minor, the courts have recognized the right or power of the parent to control over that of the child as a proper exercise of not only his parental rights or powers but also his parental duties.

Historically, however, the parent did not always enjoy primacy in the determination of the religious upbringing of the child as opposed to the doctrine of *parens patriae* which literally translated means "father of his country" and in England refers to the king.[3]

During the sixteenth century when the doctrine of the divine right of the king was in full bloom and the king could do no wrong, the State did exercise its absolute will over the religious upbringing of its minor subjects.

As early as 1590 the Elizabethian government aimed at the suppression of Catholic education by enacting that only school-masters who repaired to the Established Church might be maintained, followed four years later by a further statute which punished as a *praemunire* the sending abroad of a child for Catholic education.[4]

In 1723 an English Court deprived a widow of the custody of her minor children so that they might be brought up Protestants, although both parents were Catholic. In

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3. Black's Law Dictionary, 4th Edition, 1951, page 1269

4. Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485 (1916)

1724 an English Court went so far as to order the separation of the mother and her child of seven years even though the Catholic mother was bringing up her son as a Protestant according to the wishes of her late husband.[5]

From this extremely strict concept of the doctrine of *parens patriae* a more liberal view fortunately took root.

American legal precedent seems to recognize that it is the parent who exercises the primary determination of the religious upbringing of his child. While adults are free to exercise their consciences, children are free to form theirs along the parental model. Thus in Illinois ex rel. *McCollum v. Board of Education*, (1948) 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461, students were only admitted to religious classes "upon express written request of parents, and then only to classes designated by the parents." While the members of the Court differed over whether a parent might thus affirmatively employ state instrumentalities to mold the religious conscience of his child, no one denied that the parent had such a perogative.

Although in *Prince v. Massachusetts* (1944) 321 U.S. 158, 165-166, 64 S.Ct. 438, 88 L.Ed. 645, this Court spoke of the "right of children to exercise their religion" as having been accorded recognition in *West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, and of the child's right to receive religious schooling having been sustained in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. It is clear that in neither *Barnette* nor *Pierce* did the child bring the action. In the *Barnette* case the parent brought the action and in the *Pierce* case the school presented the claim.

The courts have thus recognized the rights of parents to determine the religious upbringing of a child subject to that parent's custody and control.

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5. Ibid. at p. 486

D. A parent has a compelling overriding interest in educating his child according to his religious precepts

A parent's interest in the religious upbringing of his child is obvious. A father teaches his child the law of God because the Bible imposes that duty upon him as his personal obligation on a par with his own practice and necessary for his own salvation.[6]

In addition a father exercises a power which he holds in trust for his child, believing that learning God's law is beneficial to the child and necessary for its salvation.

It is at this point that the position of the Seventh-day Adventist Church and the respondents parallel. Seventh-day Adventists believe that "every child brought into the world is the property of Jesus Christ" and "Parents . . . carry responsibilities that no one can bear" for them. It is our position that the religious training of the child is a responsibility that cannot be surrendered.[7]

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6. This commanded by Deuteronomy 6:6,7 "and these which I command thee this day shall be in thy heart; and thou shalt teach them diligently unto thy children . . ." and Proverbs 22:6 "Train up a child in the way he should go; and when he is old, he will not depart from it."

7. White, Ellen G., The Adventist Home: Pages 182, 183

"In his wisdom the Lord has decreed that the family shall be the greatest of all educational agencies. It is in the home that education of the child is to begin. Here is his first school. Here, with his parents as instructors, he is to learn the lessons that guide him through life — lessons of respect, obedience, reverence, self-control . . ."

"It is by the youth of today that the future of society is to be determined, and what these youths and children shall be depends on the home. To the lack of right home training may be traced the larger share of the diseases and misery and crime that curse humanity."

"Every child brought into the world is the property of Jesus Christ, and should be educated by precept and example to love and obey God . . . By painstaking effort parents are to watch the opening, receptive mind and make everything in the home secondary to the positive duty enjoined

It is clear from the record that the Amish believe that they have a compelling overriding interest to educate their children according to their own religious principles.

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7. (Continued)—

upon them by God — to train their children in the nurture and admonition of the Lord."

"Parents should not permit business cares, worldly customs and maxims and fashions to have a controlling power over them, so that they neglect their children in babyhood and fail to give their children proper instructions as they increase in years."

White, Ellen G., The Adventist Home: Page 187

"Parents, you carry responsibilities that no one can bear for you. As long as you live, you are accountable to God to keep His way . . ."

"Fathers and mothers are responsible for the health, the constitution, the development of the character of their children. No one else should be left to see to this work. In becoming the parents of children, it devolves upon you to cooperate with the Lord in educating them in said principles."

White, Ellen G., Counsels to Parents, Teachers and Students: Page 107

"Upon all parents there rests the obligation of giving physical, mental, and spiritual instruction. It should be the object of every parent to secure to his child a well-balanced, symmetrical character. This is the work of no small magnitude and importance — a work requiring earnest thought and prayer no less than patient, persevering effort. A right foundation must be laid, a framework, strong and firm, erected and then day by day the work of building, polishing, perfecting, must go forward."

"Children must be trained for the service of sin or for the service of righteousness. Solomon says, Train up a child in the way he should go; and when he is old, he will not depart from it. Proverbs 22.6: This language is positive. The training that Solomon enjoins is to direct, educate, develop."

"By some, education is placed next to religion, but true education is religion. The Bible should be the child's first textbook . . . Through the inculcation of its principles they are to learn to do justice and judgment."

The Wisconsin Supreme Court in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 541 states that:

> "The old order Amish religion dictates that the Amish child from the inception of adolescence live according to the mode of life in the Amish community" and "that he should not attend high school since any high school, public or private, constitutes a deterrent to his salvation."

The Court also found that the Amish religion requires the avoidance of worldly educational environment and imposes the duty:

> "to become mature in wisdom different from what others may regard as wisdom,"

The Court specifically found that:

> ". . . to the Amish, how long a child should attend a formal school is a religious question."

E. The State has no right to disregard an individual's religious convictions simply because it does not conform to the norms of the general educational community

The Wisconsin Court correctly stated the rule that the Court is prohibited from evaluating a religious belief for ecclesiastical purposes, citing *Abington School District v. Schempp* (1963) 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 and *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 658.

In fact, in *United States v. Seeger,* (1965) 380 U.S. 163, 85 S.Ct. 860, 13L.Ed. 2d 733 at page 180 the Court recognizes the diversity of conceptions of religion in the United States and the "ever-broadening understanding of the modern religious community."

In *United States v. Ballard* (1944) 322 U.S. 78, 88 L.Ed. 1148, 64 S.Ct. 882 at pages 86-87 the Court stated that the First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

It seems that the thrust of the State's position now, however, is that the decision of the Wisconsin Supreme Court has somehow spread the "disease of ignorance." The record not only does not support any finding that the "Amish way" is a way of ignorance, the Court noted in its opinion in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 543 that:

> "The Amish claim, with compelling merit, that their education produces as good a product as two additional years compulsory high school education does."

The Court noted in a footnote to its opinion testimony that the Amish were not on welfare, were not unemployed, did not have illegitimate births and did not add to the social burdens of the taxpayers of Green County. Surely these are not the fruits of ignorance.

When one looks at the current drug subculture which was bred inside the best of our educational facilities in comparison to the Amish subculture, it is somewhat difficult to swallow the State's inference that Amish children have been neglected by their parents.

Is the State serious in its assertion that Amish parents have neglected their children by refusing to permit the State to offer their children the forbidden fruit of knowledge of good and evil? If so, could the State in fact take these "neglected" children from their "neglectful" natural parents and make them wards of the Court?

The State cannot impose the norms of the general educational community upon its citizens against the sincere religious conviction of an individual without proving that failure to conform to that standard is contrary to an overriding and compelling State interest as defined by the courts.

F. The State here seeks the authority to determine how a religious sect exercises its religious affairs

Equally disturbing is the attempt of the State to tell the Amish how to practice their religion. The dissenting State Supreme Court judge in *State v. Yoder* (1971) 49 Wis.

2d 430, 182 N.W. (2d) 539, 551 would have solved the problem by staying the execution of sentence (although affirming the criminal conviction)

> ". . . for such period of time as is reasonably required to properly organize and commence operation of an Amish vocational school. At the commencement of such operations, the judgment should be vacated and the complaint dismissed."

This device would not only ignore the free exercise of religion, it would place the court in a position of telling a religious body how they should practice their religion.

Encouraged by this lone dissenting position, the State Attorney General elects to tell the Amish how to exercise their religious affairs. (see page 20 of Appellant's Brief)

> "If the Amish do not want to establish secondary schools for their children," says the State, "then their children should be required to go to a more 'worldly' public secondary school."

The State Attorney General then flatly states,

> "In failing to provide for secondary education for their children, the Amish are neglecting a parental duty and obligation to their children and neglecting their duty as citizens of a democracy from which they have reaped ample benefit." (See pages 20 & 21 of Appellant's Brief)

Neither the courts nor the law enforcement agencies of the State have any business telling any person or religious sect how it will worship or believe.

G. In considering the doctrine of *Parens Patriae* the State Supreme Court properly considered the psychological harm that might result to a child forced to violate a cardinal precept of his religious training

In order to validly use the doctrine of *parens patriae,* the State would have to demonstrate that the child is being

harmed and that the action of the State will in turn not cause greater harm. This doctrine is most generally used by courts handling adoption, juvenile neglect and child custody cases.

In such cases the court gives great weight to the psychological effect on the child of any action it might take in the exercise of its powers of *parens patriae*.

> "Once the religious education of the child has progressed so far that definite religious ideas have been impressed upon its mind to the extent that a change would unsettle its traquility and disturb its mental poise, the parents are precluded from further interference with the continued development of that religious education which the child has thus acquired."[8]

This concept was no doubt in the minds of the majority of the Wisconsin Supreme Court in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 542, when it stated:

> "To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child."

The impact of psychological effects on children has been recognized by this Court as an important consideration in a determination of this kind. In *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483, 74 S.Ct., 20 L.Ed. 873 the Court gave weight to such a factor.

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8. Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485, 493. This author goes on to state on page 494, "There are cases, no doubt in which a child has from infancy until years of discretion been brought up in one particular form of religion, where the Court may consider it dangerous to compel such a child to be brought up in a different and conflicting religion, lest the diverse and conflicting teachings should make shipwreck of the child's faith, and impair its moral character. . ."

II. The Extent To Which A Person Is Permitted To Exercise His Religious Freedoms As Guaranteed By The Federal Constitution Should Be Uniform Throughout The Nation And Not Limited By State Boundaries

We are told by the appellants that the Amish must look to the legislature of the various states to find protection in the exercise of their religious convictions.

A few states such as Kansas and Iowa have by legislation exempted the Amish from compulsory education laws. Other states such as Indiana and Pennsylvania have made exemption provisions by agreement. In Michigan the question has been temporarily dealt with by action of the State Board of Education.[9]

As noted by the Wisconsin Court in *State v. Yoder* (1971) 49 Wis. 2d 430, 182 N.W. (2d) 539, 542

> "The impact on the Amish of education laws is so severe that in other states where they were required to send their children to public schools, they sold their farms and sought religious freedom elsewhere."

In *People v. Woody*, 61 Cal. 2d 716, 727 40 Cal Rep 69, 77, 394 P. 2d 813, 821 (1964) the California Court said,

> "In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes even more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty."

It is a disturbing, and we submit, improper concept which would force a citizen of this nation to move from Wis-

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9. Appendix A, Brief for Respondents in Opposition On Petition for a Writ of Certiorari to the Supreme Court of the United States, pages 1a-4a.

consin to Kansas in order to practice his religious views and to raise his children according to the dictates of his conscience.

The First Amendment is applicable in all states of the union. The Amish have been guaranteed the right to the free exercise of their religion in Wisconsin as well as Kansas.

Unless the State can show that the infringement of the Amish people's right to the free exercise of religion is justified by an overwhelming governmental interest, it has no right to enforce such a law which has the effect of requiring that person to either violate his conscience or move to another state.

In *Takahaslin v. Fish & Game Comm.* (1948) 334 U.S. 410, 92 L.Ed. 1478, 68 S.Ct. 1138 the Court recognized that the Fourteenth Amendment embodies a general policy that all persons lawfully in this country have a right to live in any state. It is submitted that so long as an overwhelming governmental interest is not in conflict, as determined by the tests set out in *Sherbert v. Vernor,* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965, any person should be permitted to live and practice his religious views in any state of this United States.

Must any religious group collect into large bands of a size significant enough within a state to gather the political force necessary to compel a legislature to exempt them from a state imposed obligation that violates their religious beliefs? What if the small religious groups, although as sincere and dedicated as those who can compel state attention, are not able to gain the tolerance of the majority? Are they therefore left with no relief? Is this dilemma not the purpose of the First Amendment Freedoms? The argument of the State that the Amish must gain relief through legislative exemption is merely a claim that their religious practice is not constitutionally guaranteed but may only be tolerated so long as a political majority may determine.

III. The State Court Was Correct In Determining That The Wisconsin Compulsory School Attendance Law Is Unconstitutional As Against The Claim Of Respondents That Their Right To Worship Freely Would Be Violated If They Were Compelled To Send Their Children To A Secondary School

A. The test announced in *Sherbert* applies to this case

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." United States Constitution Amendment I.

Of all the constitutional guarantees, the protection of religious liberty has been the most exalted. See P. Kauper, *Religion and the Constitution* 19, (1964) (and the cases cited therein). And rightfully so, for perhaps to the individual there can be nothing more centrally controlling, revered, and treasured than a sincere and deeply held religious conviction. It was this consideration which moved the drafters of the First Amendment to provide that governmental interference with the relation between an individual and his God must be kept to a minimum.

The question arises — when may conduct prompted by a religious conviction be regulated by state law? The Supreme Court answered that question in its landmark decision in *Sherbert v. Verner*, (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965.

In *Sherbert*, a member of the Seventh-day Adventist Church was discharged because she would not work on Saturday, the Sabbath Day of her faith. Sherbert filed a claim for unemployment compensation benefits under a state statute which provided that a claimant was ineligible for benefits if she had failed, without good cause, to accept available suitable work when offered her. The State denied Sherbert's application on the ground that she did not accept suitable work when offered to her. The Court held that to disqualify Sherbert solely on the ground that she had refused Saturday work, when the acceptance of

such work would have been contrary to her religious beliefs, was to impose an unconstitutional burden on the free exercise of her religion. In so holding, this Court announced a several fold test for balancing the competing interests:

1. Is there a burden imposed on the exercise of religion?

"If . . . the decision of the (court below) is to withstand Appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise . . ." 374 U.S. at 403.

2. If there is such a burden, is the infringement justified by a compelling governmental interest?

"We must . . . consider whether some compelling (governmental) interest . . . justifies the substantial infringement of Appellant's First Amendment right." 374 U.S. at 406.

a. Is the governmental interest substantial?

". . . only the gravest abuses, endangering *paramount* interests, give occasion for permissible limitation . . ." 374 U.S. at 405 (citation omitted) (emphasis added).

b. Is this the sole method by which the government may attain its goal?

". . . it would plainly be incumbent upon the (government) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights." 374 U.S. at 407 (footnote omitted).

3. Would an exemption for those with religious scruples *in fact* impair the governmental interest?

"The Appellees suggest no more than a *possibility* (that the government's interest would be impaired). 374 U.S. at 407 (emphasis added).

The test announced in *Sherbert* has been restated and applied in several recent cases:

> "But the burden rests upon the Government to demonstrate the compelling interest requiring the restriction of free expression and to show that the regulation serves that interest with the least restriction possible on the citizens ability to communicate his political dissent." *Women Strike for Peace v. Hickel,* 420 F. 2d 597, at 605, (D.C. Cir. 1969).

> ". . . Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. (A showing of a compelling governmental interest and) an equally convincing showing that 'no alternative forms of regulation would combat such abuses without infringing First Amendment Rights.' " *Barnett v. Rodgers,* 410 F. 2d 995, at 1000 (D.C. Cir., 1969).

> "The Court in *Sherbert* thus utilized a twofold analysis which calls for a determination of, first, whether the application of the statute imposes any burden on religion, and second, if it does, whether some compelling state interest justifies the infringement." *People v. Woody,* (1964) 61 Cal. 2d 716, 719, 40 Cal. Rptr. 69.

> ". . . even if a compelling state interest were shown, the burden remains on the state (to show no alternative is available)." *Heilberg v. Fixa* 236 Fed. Supp. 405, 408. (N.D. Cal. Sd. 1964) Cf. *Kovach v. Maddux,* 238, F. Supp. 835, 844, (MD Tenn. 1965).

And in dicta the Supreme Court recently reaffirmed the validity of the *Sherbert* test:

> ". . . as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." (citing *Sherbert*) *Gillette v. U. S.,* 91 S.Ct. 828, 842, 28 L.Ed. 168 (1971).

The State has placed almost all of its confidence in their position on the opinion of *Prince v. Massachusetts* (1944) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 which was handed down by this Court in 1944. This case came many years and several decisions before the evolvement of the test announced by this Court in *Sherbert*.

It is clear that this Court has, in the past two decades since the decision in *Prince*, given more careful scrutiny to the free exercise clause of the First Amendment.

It is submitted that to this Court, religious liberty as an ideal means essentially the absence of governmental restraint on the activities of young and old alike as they seek God's will.

The decision in *Prince* cannot in 1971 be read with blinders as to the development of the law concerning First Amendment rights in the light of the principles set forth in such recent decisions of this Court as *Sherbert*. Even the doctrine of *parens patriae* must submit to the balancing tests which this Court has adopted. The time when the doctrine of *parens patriae* was synonymous with the concept of the divine right of the State is in the past.[10]

B. The application of the *Sherbert* test to the instant case will demonstrate that this is a case where "the burden on First Amendment values is not justifiable in terms of the Government's valid aims"

The Court in *Sherbert* observed that where a law having uniform application has a discriminatory effect upon an individual's religion, it is invalid:

> "... it is true that no criminal sanctions directly compel Appellant to work a six-day week. But this is only

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10. See Grannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee, 1967, Harv. L. Rev. May 1967, Vol. 80, No. 7; Also Compulsory High School Attendance and The Old Order Amish; A Commentary on *State v. Garber*, Casad, 16 Kansas L. Rev. 423, 432 (1968).

> the beginning, not the end, of our inquiry. For if the purpose or effect of a law, is to impede the observance of one or all religions or is to discriminate invidiously between religions, *that law is constitutionally invalid* even though the burden may be characterized as being only indirect, *Braunfeld v. Brown*, (1961) 366 U.S. 599, 6 L.Ed. 2d 563, 81 S.Ct. 1144. Here not only is it apparent that Appellant's declared ineligibility for benefits *derives solely from the practice of her religion —, but the pressure upon her to forego that practice is unmistakeable.* The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship." 374 at 403-404 (footnote omitted) (emphasis added)

In comparing the dilemma presented in *Sherbert v. Vernor* with the position in which the State has placed the Amish, it has been recognized that a more serious interference is present in the instant situation.

> "The interference here is clearly more serious than involved in *Sherbert v. Verner* itself. The burden on free exercise there was indirect. South Carolina did not require Mrs. Sherbert to work on Saturday; it only made it economically disadvantageous if she did not. Here, the interference with both the parent's and the child's right of free exercise (if a child has protectable interest in his own right) was direct."[11]

It is important to recognize that *Sherbert* imposes a test upon governmental regulation far more stringent

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11. Casad, Robert C., Compulsory High School Attendance and the Old Amish; A Commentary on *State v. Garber*, 16 Kansas L. Rev. 423, 432 (1968).

than that applied in the absence of a First Amendment infringement. In the "flag-salute" case of *Board of Education v. Barnette,* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L. Ed 1628, the Court observed:

> "In weighing arguments of the parties, it is important to disinguish between the due process clause of the Fourteenth Amendment (here the Fifth Amendment) as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more involved. Much of the vagueness of the *due process clause disappears when the specific prohibitions of the First become its standard.* The right of a State to regulate, for example, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. 319 U.S. at 639 (emphasis added).

In *Braunfeld v. Brown* (1961) 366 U.S. 588, 6 L.Ed. 2d 563, 81 S.Ct. 1144, Mr. Justice Brennan in a concurring and dissenting opinion observed:

> "... the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards fulfillment of collective goals." 366 U.S. 610.

In *Sherbert,* the Court announced that the test first applied in *Barnette* was to be an essential part of the balancing test applied in all future First Amendment infringement cases:

> "It is basic that no showing *merely of a rational relationship* to some colorable state interest would

suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' " 374 US at 406 (citation omitted) (emphasis added).

The *Braunfeld* case, supra and the *Sherbert* case, supra, clearly require the State to establish both the paramount governmental interest in denying religious freedom and that the same paramount governmental interest is impossible of attainment by granting a religious exemption. Neither was established in this case.[12]

1. The governmental interest is not substantial

The conduct of the Amish presents no grave threat to society. They only ask to be exempt from sending their children to secondary schools. Their conduct can hardly be said to threaten "public safety, peace or order," *Sherbert,* 374 U.S. at 403. The governmental interest in compulsory education involves no such paramount interest.

The Appellant's Brief, although ignoring the balancing test in *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 which places an affirmative burden on the State to show a compelling governmental interest, does seem to make some attempt to justify the State's encroachment into the area of the free exercise of religion by reference to education as a needed aid to the continuation of a free nation.

The State quotes several statements made by Thomas Jefferson in their apparent attempt to demonstrate a "compelling interest" of the State. (See appellant's Brief pages 10 & 11) These quotations presumably are to replace the evidentiary burden of the State under *Sherbert* which is missing from the record in this case.

It is submitted that such historical quotations are not sufficient to meet the requirement that the compelling interest be against "only the gravest abuses, endangering

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12. It is maintained that Appellant has the burden of proof in meeting this test. *Sherbert,* supra.

paramount interests." *Sherbert v. Verner,* 374 U.S. at 406.

However even Thomas Jefferson gave adequate refutation to the position of the Appellants when he stated:

> "Is it a right or duty in society to take care of their infant members in opposition to the will of the parent? How far does this right and duty extend? — to guard the life of the infant, his property, his instructions, his morals? The Roman father was supreme in all these: we draw a line, but where? — public sentiment does not seem to have traced it precisely. Nor is it necessary in the present case. It is better to tolerate the rare instance of a parent refusing to let his child be educated than to shock the common feelings and ideas by the forcible asportation and education of the infant against the will of the father."[13]

2. *The Government has alternative means available to attain its legislative goal*

Assuming the Appellant could prove some paramount government interest, they must still prove that the Government has no alternative means to attain its legislative goal.

In announcing the test to be applied in *Sherbert,* the Court adopted the proposition enunciated in *Shelton v. Tucker* (1960) 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247:

> ". . . it would plainly be incumbent upon the (government) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." (citing *Shelton*) (footnote omitted) 384 U.S. 407.

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13. Thomas Jefferson and Education in a Republic, Edited by Arrowood, page 61 (Citing "Early History of the University of Virginia as Contained in the Letters of Thomas Jefferson and Joseph C. Cabell," p. 97).

In striking down a state requirement that teachers file affidavits listing the associations of which they were members, the Court observed:

> "In a series of decisions, this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties *when the end* can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose." *Shelton v. Tucker* (1960) 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247 (emphasis added).[14]

In *Sherbert*, the State argued that if it were made to grant an exemption to those who refused to work on Saturdays because of religious scruples then:

> ". . . the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling of employers of necessary Saturday work." 374 U.S. at 407.

But since the state failed to show that the fund available for unemployment compensation could not be safeguarded if Sabbatarians were permitted to refuse Saturday work, the Plaintiff prevailed:

> "... The Appellees suggest no more than a *possibility* (that the government's interest would be impaired)." (emphasis added) *Sherbert*, 374 U.S. at 407.

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14. For examples of recent cases in which the government was required to demonstrate that it had no alternative means available for attaining the legislative goal and still protect First Amendment rights; see: *Kovach v. Maddux*, 238 F. Supp. 835, 844 (MD Tenn. 1965); *Heilberg v. Fixa*, 236 F. Supp. 405, 408 (N.D. Cal., S.D., 1964); *Barnett v. Rodgers*, 410 F. 2d 995, 1000 (D.C. Cir. 1969).

In the instant case, the Appellant must prove that the granting of a religious exemption would substantially impair a paramount interest of the Government in promoting public safety, peace or order.

> "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert,* 374 U.S. at 403.
>
> ". . . in this highly sensitive constitutional area, "*only the gravest abuses,* endangering paramount interests, *give occasion for permissible limitation . . .*'" (citing *Thomas v. Collins*) (emphasis added) *Sherbert,* 374 U.S. 406.

CONCLUSION

The State seems to acknowledge that Amish people are "fine, pious, industrious and thrifty" and can find nothing in the practice of their religion harmful to their fellowman. Also the State must recognize that compulsory education violates basic cardinal precepts of the Amish religion and that it would tend to destroy its continued existence by the State through its education system driving a wedge between parent and child.

The State overlooks the grave psychological disturbances that will inevitably spring from being taught by day teachings that are religiously opposed by the parent and living by night under parental authority that condemns the child's daytime activities as sin. The resulting guilt complexes that would be experienced by the child are inevitable. Nevertheless the State ignores the realities of life and rests its case on its desire to guarantee the Amish child the dubious advantage of our sick society.

Whether one accepts the above statement, an examination of the record discloses that the State has utterly and completely failed to show that it has an overwhelming governmental interest of such a character and nature as to dictate and compel the Amish to either capitulate to

the State and compromise their religious conviction or find a new home where conscience is less restricted and religious freedom is given greater respect.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1971

No. 70–110

STATE OF WISCONSIN,

Appellant,

vs.

JONAS YODER, ADIN YUTZY, WALLACE MILLER,

Appellees.

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA

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(4743) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587

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Interest of the Amicus Curiae

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totalling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions.

This brief amicus curiae is an implementation of such policy. It does not attempt to deal with the entire range of issues or argument before the Court, but only with those aspects on which the amicus can make a pertinent contribution derived from its particular character, outlook and experience. The following material goes mainly to the unique place of the Amish communities in the Christian tradition and in the nation, the danger posed to their survival as a living community by compulsory secondary education in public schools, and the importance of protecting their free exercise of religion — not only for their sake but for the common good.

In 1961, the General Board of the National Council of Churches was considering a policy statement entitled PUBLIC FUNDS FOR PUBLIC SCHOOLS when an amendment was offered by the Rev. Dr. Eugene Carson Blake, then chief executive officer of the United Presbyterian Church in

the United States of America and now Secretary General of the World Council of Churches. The Blake amendment was incorporated in the policy statement as ultimately adopted, and forms the policy basis for this brief. In pertinent part, the General Board, by adopting Dr. Blake's language, affirmed

> the right of all parents, all citizens, and all churches to establish and maintain non-public schools whose ethos and curriculum differ from that of the community as a whole. (The Constitution of the United States as presently interpreted guarantees this right.)
>
> In principle Protestant and Orthodox Churches claim the right for themselves to establish and maintain schools in any community where the ethos of the public school system is or becomes basically inimical to the Christian education of our children.

This statement was designed as a corrective to a policy statement supporting federal aid to education in public schools, reminding the churches of an earlier and deeper commitment to education for righteousness, against which any system of schools must be evaluated. The emphasis is not so much on setting up alternative private schools as it is on developing and carrying on whatever forms of education are necessary to safeguard the Christian upbringing of children.

It is the essential thrust of the Blake amendment that responsible religious groups in this country have the right to undertake, not just an imitation of conventional education, but a funda-

mentally different type of education from that generally prevailing in a given state or locality — one whose whole "ethos and curriculum differ from that of the community as a whole" — if necessary to embody and inculcate their understanding of what the divine Will requires.

Certainly this is not an unlimited right, but the religious bodies of which the statement speaks are not going to institute educational enterprises that are quixotic, eccentric, or doctrinaire or that pose hazards to their adherents or others. Many of them were engaged in general education centuries before there was a State of Wisconsin, and are fully as capable of choosing among arguable theories of pedagogy as are civil entities which have entered the field of education more recently.

The Old Order Amish, like most branches of the Mennonite tradition, are not constituents of the National Council of Churches. But the entire Christian movement would be poorer if the Amish were forced to conform to the environing society, and that society itself would be poorer if the Amish were compelled to emigrate, as they have often done in preference to conforming.

Therefore, the National Council of Churches in this brief seeks to express its interest, not only in the maximizing of religious liberty, but in the preservation of the Amish as a living embodiment of an ancient alternative understanding of the good life.

Argument

I.

THE AMISH ARE THE MOST CHARACTERISTIC SURVIVING ELEMENT OF A UNIQUE AND IMPORTANT BRANCH OF CHRISTIANITY, WHICH HAS MADE SIGNIFICANT CONTRIBUTIONS, NOT ONLY TO RELIGION, BUT TO WESTERN CIVILIZATION AS A WHOLE, AND WILL CONTINUE TO DO SO IF NOT FORCED TO ABANDON ITS TRADITIONS.

A. The Place of the Amish in Christianity.

The three respondents in this case are adherents of the Mennonite-Amish tradition, which derives from the Anabaptist movement of the early sixteenth century. Christianity has diverged into the following main branches, each making its distinctive contribution to the understanding and expression of the Christian faith:

1. Eastern Orthodox

2. Roman Catholic

3. Lutheran

4. Reformed (Calvinist, Presbyterian, etc.)

5. ANABAPTIST

6. English Reformation

   a. Anglican
   b. Wesleyan
   c. Baptist
   d. Quaker, etc.

The Anabaptist movement has been called "the left wing of the Reformation"[1] to distinguish it from the churches founded by Luther and Calvin, which became territorial or state churches. Though chaotic in its early years, the "left wing of the Reformation" produced several stable strands:[2]

1. Swiss Brethren

2. South German Brethren

3. Dutch Mennonites

4. Hutterites

The first two were largely dispersed by persecution, though some of their descendants have regathered in the United States to form various churches of the "Brethren."

The third group followed Menno Simons in the Netherlands beginning about 1536. A century and a half later, among the remnants of the Swiss Brethren, Jakob Ammann led a return to stricter Anabaptist faith and practice. His followers are the Amish, dating back to 1693. There has been much mingling and interchange among these closely-related strands, and today in the United States the term "Mennonite" usually is applied to the broader group, with "Amish" being the name used for a smaller, more conservative element within

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1. Bainton, Roland H., Studies on the Reformation, Boston: Beacon Press, 1963, pp. 119ff.

2. Littell, Franklin H., The Origins of Sectarian Protestantism, New York, Macmillan, 1964, p. 45.

or alongside it. At the center of the Amish group are the Old Order Amish, the most rigidly traditionalist of all.

The Anabaptist ideals later inspired other movements, such as the English Baptists and Congregationalists (among which were the Pilgrims who fled assimilation in Holland and landed at Plymouth Rock). But the purest and most uncompromising adherence to the original ideals of the Anabaptist movement are to be found among the Old Order Amish (and among the Hutterites, who are also resisting assimilation in the Dakotas, Montana and Canada).

John Hostetler, in a study of Amish-Mennonite groups in Mifflin County, Pennsylvania, discerns nine groups of varying strictness in one valley, which he diagrams in a series of concentric circles, with the most traditionalist group at the center, in the following progression: (1) Old School (Yoder), (2) Old School (Zook), (3) Byler Amish, (4) Peachy Amish, (5) Zook Amish, (6) Conservative Mennonite, (7) Allensville Mennonite, (8) Belleville Mennonite, (9) Protestant.[3] There is a constant outward flow from the stricter groups (which have a higher birth-rate) to the less strict, as individuals, families and congregations who find the Old Order too confining can move out to less rigorous Amish or Mennonite groups, where they often have relatives, since there has been much intermarrying among them in the many generations since they began to arrive in this country in the 18th century.

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3. Hostetler, John A., Amish Society, Baltimore: John Hopkins Press, 1963, pp. 237 ff.

The less-strict groups have relaxed the original ideals of the Anabaptist movement in various adjustments to "the world," but they can afford this luxury as long as the Old Order persists at the center of the fountain to keep the faith pure, and refreshes with its example and its emigrants the more assimilated groups which surround it like a series of settling basins. Thus the Old Order is the source and standard which keeps the whole Amish-Mennonite movement in touch with its Anabaptist origins.

B. Anabaptist Contributions.

The Anabaptists sought, not to reform the Christian Church of their day, but to restore the original Church of the New Testament (as they understood it). To do this, they joined together in little bands of believers determined to risk everything, including their lives, to practice the radical teaching of the Gospel. They began by baptizing one another into the new way, which earned them the epithet "re-baptizers" (Ana-baptists). Baptizing adults who had already been baptized as infants in the established Church was an offense punishable by death, but this act symbolized for the Anabaptists the mature, voluntary, and knowledgeable choice required for joining the faithful congregation.

They rejected the validity of force as a determinant in religion, insisting that the magistrate (the State) has no authority in matters of faith. They would obey the magistrate in anything which did not violate their religious duty, but would not themselves serve as magistrate or his minions

(soldiers) in the coercing of others. They would not resist either lawless evil or the "lawful" yet coercive power of the state. They rejected both violent revolution and violent persecution, but their only answer to either was migration or martyrdom.

Anabaptists eschewed for themselves all pomp, power, wealth, prestige, ostentation and sophistication. They sought instead an humble and unpretentious way of life, if possible close to the land. They undertook to care for one another in life's vicissitudes, so that no member of the congregation should suffer want. Each congregation formed a self-governing band which sought to keep itself "unspotted from the world." Their sole authority was the Holy Scripture, as interpreted and applied by each congregation, in which every member had a full and equal voice. In order to be able to take his part in the deliberations of the congregation, each member had to know how to read the Scripture. Thus the Anabaptist movement was one of the first organizations to require a standard level of literacy among all its members, and to institute methods of instruction to achieve it.

When new problems arose, the congregation discussed them in the light of Scripture and tradition until a consensus was reached — a form of "participatory democracy" developed at a time when there was no democracy whatever in Church or State. After a consensus had been reached, no one was entitled to depart from it without suffering the "ban" (Meidung) — ostracism from the congregation. These practices are still observed among the Amish.

Thus the Anabaptists initiated or first gave practical effect to several important elements in Western civilization:

1. Rejection of civil coercion in religious matters;

2. Separation of church and state;

3. Common universal education;

4. Self-government by mutual persuasion within a community of equals.

They have also embodied, and continue to embody in the Amish-Mennonite tradition, several ideals that Western civilization has not yet accepted but some day may — if the model is not lost:

5. Non-violence, "defencelessness";

6. "Plain living";

7. Mutual aid;

8. "Living loose from the world."

These contributions were not made without cost. The Anabaptists' insistence upon living differently from their neighbors led to trouble — and it still does. In several Swiss cantons, the property of Anabaptists was confiscated, hundreds of special police were appointed to track them down or hound them out of the territory. Many were executed — often without trial or hearing — for the crime of "re-baptizing," or on any plaus-

ible pretext. Others were thrown into prison, exiled, burned or hung. They were harried from town to town, hiding with families who risked their own safety to shelter them, persecuted by Roman Catholic and Reformed authorities alike. Yet, through all this persecution, they persisted in their chosen and distinctive way of life until it affected the rest of society, as previously indicated.

Over the years, they have fled from one refuge to another, from Switzerland to Alsace, to Würtemberg, France, Luxembourg, Germany. One group went to Austria and thence to Russia and finally to the United States in search of a place where they could obey God without interference. Now some have left this country for Canada or Paraguay because they feel they have not found their long-sought haven here. It is not Paraguay which has a Bill of Rights guaranteeing free exercise of religion, but the United States. And the United States will be poorer if the Amish must leave it to escape forced assimilation.

II.

THE AMISH DO NOT OPPOSE EDUCATION NOR FAVOR IGNORANCE; THEY REQUIRE THAT EVERY MEMBER OF THE CONGREGATION BE EDUCATED: BUT IT IS A DIFFERENT MODE OF EDUCATION FOR A KIND OF LIFE DIFFERENT FROM THAT FOR WHICH CONVENTIONAL SCHOOLING IS REQUIRED BY THE STATE OF WISCONSIN.

A. The Amish Commitment to Education.

The brief for petitioner seriously misrepresents the situation when it implies that the Amish are the source of a "disease of ignorance" from which the State must protect the child.[4]

> In failing to provide for secondary education for their children, the Amish are neglecting a parental duty and obligation to their children and neglecting their duties as citizens of a democracy from which they have reaped ample benefit.[5]

It is ironic that the State of Wisconsin undertakes to define the duty of the Amish in regard to education when the Amish since 1693, and the Mennonites since 1536, have been painstakingly educating every child in their gathered community. This they did long before the secular state made any effort to educate everyone and centuries before there was a State of Wisconsin. But

4. Brief for Petitioner, p. 9.

5. Ibid, pp. 20-21

Amish education is devoted to preparation for a way of life different from that which dominates twentieth-century American life.

> True education, for those of the Anabaptist-Mennonite line . . . is devoted to the cultivation of simple living, humility (Demut), long-sufferingness (Gelassenheit). Their system of elementary education, which was developed very early, was aimed at producing young adults capable of participating wholeheartedly in the life of the Christian community. Across the generations they have centered school curriculum in reading, writing, arithmetic, and the Bible — the subjects in which a full and participating member of the community needs proficiency.[6]

Because their mode of education requires basic ability to read, write and do simple arithmetic, the Amish utilize the public schools for the elementary levels of education. It is only at the level of secondary education that many Amish groups feel they cannot send their children to public schools.

B. Why the Amish Object to Public Secondary Education.

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6. Littell, Franklin H., "Sectarian Protestantism and the Pursuit of Wisdom," p. 65, in Public Control for Non-Public Education, Donald A. Erickson, ed. (Chicago: University of Chicago Press, 1969), citing "Education, Mennonite" and "Education Among the Mennonites in Russia," in Mennonite Encyclopedia (Scottdale, Pa.: Mennonite Publishing House, 1956) 2:150-57.

The objection of the stricter[7] Amish groups to public secondary education has three elements, according to a study based on interviews in Amish homes conducted by a staff member of the National Council of Churches:

1. The amount of education required . . . The Amish believe all children should be educated for what they consider the good life — farming or farm-related occupations, with a minimum of modern science or technology. The number of years of school is not as important to them as the content of education. Since formal education tends toward acculturation, they seek to minimize the time their children are exposed to this hazard.

2. The place where education is required. . . . The center of their anxiety is really the consolidated high school in the "wicked city." To avoid this peril, they . . . resist transportation of their children by bus into town, even in the lower grades and even when promised homogeneous Amish classes in town. It is the town itself which infects the child with worldly influences far from the protective aura of the family and faith group.

7. The point is sometimes made that some Amish groups do not object to public high-schooling for their children, as though that invalidated the objections of others. Each Amish congregation determines such decisions for its members, and it is usually the more conservative congregations, trying to preserve the "purer" form of their faith and practice, which reject public secondary education and the more assimilated Amish groups which accept it, thus augmenting their assimilation.

3. The degree of training of the teacher . . . The Amish would be able to educate their children entirely in their own private schools with teachers of their own faith if it were not for (the State's certification) requirement, since members are not supposed to have more than eight years of education themselves.[8]

C. The Amish Pursuit of Wisdom.

The reasons behind these objections can be found in an understanding of the distinctive nature of Amish life and of the education that prepares for it and is integral to it. Franklin H. Littell, a distinguished church historian who did his doctoral research on the Anabaptist movement and who wrote several articles on the Amish controversy in Iowa in 1966 while he was president of Iowa Wesleyan College, differentiates between two traditions in education.

Since the Middle Ages, he writes, "educators . . . distinguished education devoted to wisdom (Logos) from training in skills (Techne) . . . Wisdom . . . relates to continuity and wholeness and ultimate coherence,"[9] whereas technical training and its partner, scientific research, separate one specialization from another, the observer from his data, and the scholar's personality from his subject matter.

8. Kelley, Dean M., "Is There Room for the Amish?" in Town and Country Church, May-June, 1966, pp. 7 ff., a publication of the National Council of Churches, New York, N.Y.

9. Littell, "Pursuit of Wisdom" in Erickson, op. cit., pp. 69-70.

The Amish, Littell points out, follow the method of training in wisdom — how the good life is to be attained — and are distrustful of the critical-analytical-impersonal approach of scientific-technological education, since it tends to shatter the wholeness of the Amish "pursuit of wisdom." For this reason they reject the public high school, where scientific-technological education begins to become prominent, not because they fear modern knowledge or cherish ignorance, but because they are devoted to a different tradition, where technical proficiency is not divorced from moral and spiritual excellence.

D. The Amish Follow the "Oral Tradition."

Furthermore, Littell maintains, the Amish are followers of the pre-literary "oral tradition," which long antedated the development of printing and even of writing. To its skills of memorization and rhythmic rote-recitation we owe the initial transmission of the oldest holy writings of the major faiths. It is a way of assimilating and transmitting human lore that has its distinctive strengths (and weaknesses).

> The re-enactment of Biblical events and happenings in their own history, and the personal appropriation of group memory and group wisdom, make up the bread of the mind's life. Such a situation is "pre-scientific," but it is not anti-intellectual . . . There is no distinct boundary between (teaching) and the teacher's way of life as a whole. In training teachers for their schools, the Amish, like Jews and Christians of the

> early period, have preferred an apprentice system — very well developed — for formal instruction in "teaching methods" . . .
>
> From the lips of a credible witness, and by the example of his life, the ultimate meanings could be learned. . . .[10]

It is because of this tradition that the Amish are more concerned about the character of the teacher than about the content of the curriculum. If the teacher is a good man or woman, the product of years of "apprenticeship" in the Amish understanding of life, he or she can be trusted to transmit — and, more important, to embody — what it is really needful for Amish children to know. The non-Amish teacher has not undergone this essential training and so — whatever his or her academic attainments — cannot be relied upon to deliver genuine "education" as the Amish understand it.

E. The Amish Community Educates.

Lastly, Amish education is not dependent upon the relatively artificial, abstract and sequestered methods of public schooling. It is not confined to four walls or to a few hours of the day. It goes on all day long, wherever the child is in the close-knit Amish community. As Donald E. Erickson, Assistant Professor of Education at the University of Chicago, has noted in commenting on an Ohio case:

> In the Hershberger case (103 Ohio App. 188,

10. Littell, "Pursuit of Wisdom," p. 75.

> 1955), what happened within the four walls of a public schoolhouse was compared merely with what happened within the four walls of an Amish schoolhouse, and the fact that Amish children are educated largely outside school walls was deemed irrelevant. The Amish community assigns but limited functions to formal instruction, requiring the school merely to teach the three R's. Yet away from the schoolhouse, each child undertakes a graduate series of tasks under parental tutelage. Kitchens, stables, markets, and fields — not classrooms — are the principal education facilities. Many public educators would be elated if their programs were as successful in preparing students for productive community life as the Amish system seems to be . . . As tax-supported education struggles with the drop-out and potential drop-out, it is introducing sizeable components outside school walls . . .[11]

To be sure, most learning for most people takes place outside the classroom. It is because the environmental source may be inadequate for some that classrooms were developed and are now, rather superfluously, required by law for all. Where the natural environmental education is adequate for all purposes which the state should be entitled to require, it is supererogatory to require that it be supplemented by classroom study.

Because the Amish community as an integral

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11. "How to Exterminate the Amish Without Really Trying," in Erickson, op. cit.

whole is the assiduous educator of the Amish children, from childhood through adulthood, it is understandable that the Amish should object to the extraction of their children from that nurturing medium and their transportation to the artificial enclosures of public-school classrooms. To them, the secondary schooling required by the State is not only time lost from genuine education, but it is, by its very nature and in the respects recited, positively pernicious.

The State of Wisconsin, throughout its brief, continually assumes that education takes place only in "schools.".

> Viewing then, popular education in the school as vital to the perpetuation of society, one can accept the extension of the common school idea to the point where it embraces compulsory education for all children in some school whether it would be public or private.*

It would be risky in respect to most persons and groups for the State to assume that they will acquire an education without certain required schooling. But in certain exceptional instances, such as that of the Amish, the State should be prepared to follow the folk-adage, "Don't let schoolwork interfere with your education."

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12. Respondent's brief, p. 14, emphasis added.

III.

ENFORCEMENT OF THE STATE'S STANDARDS OF EDUCATION REPRESENTS A GENUINE THREAT TO THE CONTINUATION OF THE AMISH RELIGION, WHEREAS THE AMISH RELIGION DOES NOT REPRESENT A THREAT TO ANY COMPELLING INTEREST OF THE STATE.

A. The Threat to the Amish.

The decision in the Court below recognizes the severe conflict between the requirements of the State and the religious duties of the Amish.

> The law commands the appellants to perform affirmative acts which are repugnant to their religion. To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into a homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child . . . The impact on the Amish of compulsory education laws is so severe that in other states where they were required to send their children to public schools, they sold their farms and sought religious freedom elsewhere . . . When the Amish can no longer move, the impact may result in the extermination of their religious community.[13]

13. Decision of Wisconsin Supreme Court, January 8, 1971, as reproduced in Appendix to Petition for Writ of Certiorari, p. 106.

It is hard enough to maintain a non-conforming religious community against the diffuse contrary influences of secular culture without the State compelling acculturation by law. As indicated above, even the limited requirements of the State of Wisconsin would have the unavoidable effect of making the Amish community something other that it is and wants to be. The required certification of teachers, even in parochial schools, means that those teachers must be products of the very literary-scientific-technological culture the Amish consider demonic. Since no Amish teachers could remain true to the faith of the strict congregations and at the same time qualify for State certification — as State law requires — the consequence is that the Amish cannot permit their children to attend even parochial secondary schools without subjecting them to "alien" teachers and thereby jeopardizing their attachment to the Amish way of life and their eternal salvation.

A fortiori, the Amish cannot consent to their children's attendance at public high schools in the "wicked city," or even the presumably less wicked small town, without even greater risks: not only of "alien" teachers but a totally "alien" environment predicated upon and permeated throughout with precisely the "worldly" values against which the entire Amish tradition and teaching is a protest and reproach. They cannot risk this exposure of their adolescent children without risking their conversion to the alien world, or at the least their partial acculturation, which means the attenuation and attrition of Amish identity.

Just as a person resists as much as death itself the involuntary alteration of his identity and unique personality through "brainwashing" or lobotomy, so a religious community understandably resists its alteration by outside forces and considers the loss of its identity tantamount to "death." "Freedom of religion" should mean that religious communities which do not pose the threat of harm to others should not be obliged by law to risk the loss or change of their identity unless some compelling interest of the State is at stake.

B. The State's Interest.

The brief of petitioner, the State of Wisconsin, presents a glowing tribute to the importance of education as a compelling interest of state and nation. The history of the Amish suggests that they might well agree — provided the definition of "education" is broad enough, and it is not confused with mere schooling. What is less clear is that the legitimate and arguably "compelling interest" of the State justifies the State in compelling all children to attend the same kind of school.

Actually, the competition for jobs in a technologically-advanced society has virtually eliminated the need for compulsory education laws, since those students who do not obtain a maximum of education will fall behind in the race for jobs and advancement — a race in which the Amish refuse to enter. There may be a few children who would not be in school except for the law, and perhaps they justify the invoking of the police

power in respect to education. At any rate, the constitutionality of the compulsory education law as applied to others is not at issue in this case, only its application to the Amish.

In the case of the Amish, it is contended, the plea of free exercise of religion should protect them from all but the most compelling interest on the part of the State, which interest the court below ruled the State had failed to substantiate. The dialectic begun with the classic case of Pierce v. Society of Sisters continues. In that case, the State of Oregon attempted to compel all children to attend public schools, but this court ruled that non-public schools had a right to exist. Now the State of Wisconsin insists that all schools must be like public schools in their basic curriculum, duration, teachers' qualifications and architecture. Is this not simply another level of the question answered by this court in Pierce?

Among the most cherished assurances voiced by this court is the one that seems directed to the central issue in this case:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (Pierce v. Society of Sisters, 268 U.S. 510)

Is not the attempt by the State to standardize its schools tantamount in effect to an effort to "standardize its children by forcing them to accept instruction from public teachers only" or from teachers indistinguishable from public teachers?

The court noted that standards for schools were not at issue in that case:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. (Ibid.)

Now this court is faced with the further form of the question of what constitutes the impermissible "standardization" of the people's (not the State's) children.

The State certainly has a duty and a responsibility — a compelling interest — to prevent any schooling, or lack of it, which clearly endangers the health or safety of children, or of anyone else. Likewise, it need not, should not, tolerate any mode of education or non-education which produces criminals or those who will become dependent upon society for their livelihood. But, as shown by the record, the Amish mode of education has made a far better showing than the public schools in

this respect: it has produced no felons and no public-welfare cases. No allegation has been made, let alone substantiated, that Amish education jeopardizes the health or safety of Amish children.

The only claim the State makes in respect to the children is that it must protect their "substantive right to an education."[14] The State expressed solicitude for the Amish children who are kept in economic subjection by their lack of education:

> Regardless of his ability or desires, the young adult Amish has only two alternatives: to join the Amish church . . . between sixteen and twenty, or to make his way in the other world with only an eighth grade education.[15]

As indicated in Hostetler's definitive Amish Society, this is not the condition of hopeless captivity that the State implies. Not only is there a constant outflow from the stricter Amish communities to the less-strict, but there are also a few precipitate breaks, especially among young men:

> Defecting Amish young men, though very few, tend to make abrupt changes like joining the army.[16]

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14. Petitioner's Brief, pp. 18 ff.

15. Ibid.

16. Hostetler, op. cit., p. 243; Ibid. p. 242

Thus it can scarcely be contended that Amish members cannot escape the community if they choose. Indeed, Hostetler himself did so, becoming a learned professor, yet without losing an affinity for his heritage.

This hypothetic hazard is nowhere substantiated in the evidence by testimony from anyone unable to leave the Amish community, or miserable in the outer world (beyond the common lot of men), because of educational deficiencies. And if there were evidence of such bondage, what would be the appropriate remedy for the State to apply?

> We might need to provide a Halfway House for Escaped Amishmen, but not a Compulsory Acculturation School for all Amish Children.[17]

As for a "substantive right of a child to an education" asserted by the State, to be enforced by the police power in violation of the wishes of the child's own parents, what could be a clearer case of a coercive "standardization" of children at the expense of the most central convictions of the parents? Littell, because of his experience in the Office of the High Commissioner for Germany following World War II, compares this State standardization of children with the Nazi regimentation of education in Germany, and calls the effort by public educators in the United States to impose the same kind of education on everyone "pretotalitarian."[18]

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17. Kelley, op. cit., p. 9

18. Littell, op, cit., pp. 80-82.

C. The Amish Are an Exception.

The anxiety that if an exception is made for the Amish, the whole system of public education will break down is illusory. The Amish are an exception. The compulsory education law need not apply to them nor to any other religious community which for generations has produced no juvenile delinquents, felons, or public dependents, and which takes care of its own members, educating them effectively to assume the roles which they will follow in adult life.

Certainly it will do little actual harm to anyone to accommodate the public order to the necessities of religious duty. On the contrary, it would conduce to a positive good by preserving one of the most distinctive and significant forms of human organization in history. As a staff member of the National Council of Churches who studied the Amish wrote:

> The Amish are not trying to undermine or convert the rest of society. They are not competing for some position of privilege or affluence that demands equality of opportunity with others. All they ask is to be left alone to follow their peculiar obedience, which is difficult enough without the interference of the outside world, let alone the interdiction of its law.
>
> These self-sustaining, non-conforming communities are precious to our whole society. Not only are they a collective expression of the individual exercise of conscience, but they are a living reminder

of the richness and diversity open to man — a reminder that human life can be organized around other values and at other tempos that those prevailing in our harried and neurotic urban mass society. We could not pay men and women to live out these arduous alternative patterns of existence. If these fragile colonies of dissent must be crushed by the heedless onrush of the modern age, the loss to our culture will be tragic, and every citizen who cherishes the liberty to follow conscience will be poorer.[19]

Conclusion

For the reasons stated, the decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1971

19. Kelley, loc. cit.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-110

STATE OF WISCONSIN,

Petitioner,

v.

JONAS YODER,

Respondent.

STATE OF WISCONSIN,

Petitioner,

v.

ADIN YUTZY,

Respondent.

STATE OF WISCONSIN,

Petitioner,

v.

WALLACE MILLER,

Respondent.

On Certiorari to the Supreme Court of the State of Wisconsin

BRIEF *AMICI CURIAE* OF THE SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS (THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA) AND THE AMERICAN JEWISH CONGRESS

Interest of the *Amici*

The Synagogue Council of America is the coordinating body of American Judaism. Its six constituents are the recognized rabbinic and congregational representatives of the three branches of American Judaism—Orthodox, Conservative and Reform.

The American Jewish Congress is an association of American Jews organized to oppose racial and religious discrimination and to help preserve democratic values, principles and practices.

American Jewry has a strong interest in universal secular education for children. Some of the *amici* maintain and support Jewish day schools throughout the country in which children may receive their secular education from pre-kindergarten through secondary school in combination with their religious studies. All the *amici* strongly support the American public school system and deem it one of America's greatest contributions to civilization.

All the *amici,* however, also have a strong interest in religious freedom and in a religiously and culturally pluralistic America. Because of their concern that a reversal of the decision of the Supreme Court of Wisconsin may imperil these precious values, they submit this brief *amici curiae.*

Statement of the Case

Wisconsin law (Section 118.15(1), Wisconsin Statutes, 1969) requires attendance of all children at school between the ages of 7 and 16. The respondents herein, adherents to the Old Order Amish faith, cannot consistently with that faith send their children to school beyond the elementary school level and the age of fourteen. They were accordingly prosecuted for violation of the law and pleaded the First Amendment's guaranty of the free exercise of religion as their defense. The Supreme Court of Wisconsin, reversing lower courts, upheld the validity of the defense and the State of Wisconsin petitioned for and was granted certiorari to review the Wisconsin Supreme Court's decision.

The Question Presented

The specific question presented in these cases is whether a state can constitutionally punish parents who for religious convictions do not require their children who have attained the age of 14 to attend secondary school.

Summary of Argument

The Court is called upon in these cases to pass upon and resolve a clash of competing interests, all occupying high levels in our democratic scale of values. On the one side there is first and foremost the claim of religious liberty. Allied with it are the claims of religious and cultural pluralism, parental rights and family privacy, and the rights of mature minors. Opposed are the interests of the state in an educated citizenry and its obligation as *parens*

patriae to protect what it deems the welfare of persons who are legally minors.

In resolving the claim of religious liberty, tests such as the belief-action dualism or the general law test do not point to any clear decision. More significant is the high value which we have from our beginnings as a nation placed upon freedom of conscience. Recent decisions of this Court show that only the clearest proof of immediate threat to a compelling state interest will justify so serious an infringement upon that freedom as is presented in these cases. No such proof has been presented here.

Pluralism, parental right and family privacy, and the freedom of mature minors to participate in the determination of the course of their own lives, all support if they do not alone compel a decision upholding the judgments appealed from.

ARGUMENT

I

The Free Exercise of Religion guaranty of the First Amendment requires affirmance of the decision appealed from.

A. Inapplicable Tests

1. The Belief-Action Dichotomy

It is almost a truism that while under the Free Exercise Clause of the First Amendment freedom of belief is absolute, freedom to act is not and that all conduct remains subject to regulation for the protection of society. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304 (1940). This dichotomy justifies governmental proscription of polyg-

amy, child labor and breach of the peace. *Reynolds* v. *United States*, 98 U. S. 145 (1878); *Davis* v. *Beason*, 133 U.S. 333 (1890); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). It also has been urged as ground for upholding the constitutionality of a statute similar to the one in issue here when applied against Amish parents who withdrew their child from public education after she completed elementary school and attained the age of fourteen. *State of Kansas* v. *Garber*, 197 Kan. 567, 419 P.2d 896, cert. den. 389 U. S. 51 (1966).

The dichotomy itself, however, is not an absolute. It obviously cannot mean that government is not subject to constitutional restrictions in its regulation of conduct, even nonreligiously motivated conduct; the Due Process Clause remains a barrier to unreasonable and arbitrary restrictions on conduct. *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Hill Military Academy*, 268 U. S. 510 (1925). Where, as we indicate shortly, governmental restrictions on conduct impinge upon religious conscience, constitutional restraints are even more demanding. Hence, the fact that the statute herein regulates not belief but action (or, more accurately, non-action) does not immunize it from judicial scrutiny.

2. *The General Law Test*

In *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), the Court, in upholding the expulsion from public school of Jehovah's Witnesses' children who refused to participate in a flag salute exercise, said (at 594-595):

> * * * The religious liberty which the Constitution protects has never excluded legislation of general scope

> not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. * * *

Although the Kansas Supreme Court in *Garber* did not specifically cite *Gobitis,* it did apply its principle, stating that "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom."

If this principle were the law of the land today it would be difficult to uphold the decision of the Wisconsin Supreme Court in the present cause under the Free Exercise Clause, for we do not contend that the Wisconsin statute is "aimed at the promotion or restriction of religious beliefs," nor that it exceeds the reasonable exercise of the state's police power for the general welfare.

Yet, if these are the limits of constitutionally protected religious liberty there would be no need for the Free Exercise Clause. Restrictions upon the expression of religious beliefs would be forbidden by the freedom of speech guaranty. *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). A law aimed at the restriction of religious

conduct generally would be forbidden by the mandate of neutrality toward religion in the Establishment Clause (*Everson* v. *Board of Education*, 330 U.S. 1 (1947)) and one directed against a particular sect would violate both that clause and the equal protection guaranty. *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).[1]

It may well be the unique function of the Free Exercise Clause to protect those whose particular religious beliefs forbid compliance with the demands of a general, secular law not deemed objectionable by adherents of the conventional faiths. Decisions which have rejected claims of unconstitutional infringement upon the free exercise of religion are justifiable not on the ground that the First Amendment may never require exemptions from general nondiscriminatory welfare laws, but because of the presence of a paramount, overriding societal need, such as preservation of the monogamous family society (*Reynolds* v. *United States*, 98 U.S. 145 (1878) or national defense (*Hamilton* v. *Regents of California*, 293 U.S. 245 (1934)).

When the Court held that a state could constitutionally forbid Sabbatarians from engaging in secular business on Sundays it did not do so on the ground that religious exemptions from welfare laws may never be required by the First Amendment but that they are not required where the burden on religious observance is indirect and the state cannot accomplish its welfare purpose except by imposing

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1. While the Equal Protection Clause is not expressly applicable to the Federal Government, this Court has consistently stricken down Federal action which if it had been that of the states would have violated the Equal Protection Clause. See *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Schneider* v. *Rusk*, 377 U.S. 163 (1964).

the burden. *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). In the present cases, of course, the burden is direct (as it would have been in *Braunfeld* if the state law compelled affirmative conduct on Saturday rather than merely forbade secular conduct on Sunday).

In any event, the general law test is not the rule today, if it ever was. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court held that a state could not exclude from the benefits of its unemployment compensation law one who because of religious convictions refused to accept employment requiring him to work on his Sabbath. And in *In re Jenison*, 375 U.S. 14 (1963), the Court, on the basis of *Sherbert*, set aside a judgment of contempt imposed against a woman who refused to serve on a jury because she believed she would thereby violate the command of Jesus that one should not judge lest he be judged.[2] In both of these cases, the Court's decisions are quite obviously incompatible with the general law test.

B. The Applicable Principle

In arriving at the appropriate principle to be applied in these cases, we note initially that the rights of the Old Order Amish are not less because they constitute a small group. Indeed, it is only where an assailed group is a small one that the issue of religious liberty is likely to come to the courts. The purpose of a Bill of Rights is to protect minorities; a major religious group does not usually need the First Amendment for its protection. The smaller the minority, the more likely it is to need judicial protection;

2. On remand, the Minnesota Supreme Court reversed itself on the basis of *Sherbert* and held that punishment would violate the Free Exercise Clause. 267 Minn. 136, 125 N.W. 2d 588 (1964).

the greater it is, the more likely it is to obtain the protection it needs through legislative exemption. It is the "discrete and insular" minority which has the right not only to invoke judicial protection but to demand a "more searching judicial inquiry" than when major groups are involved. (*Cf. United States* v. *Carolene Products,* 304 U.S. 144, footnote 4 (1938)).

Certainly the decisions of this Court give no indication of a reluctance to intervene where the affected religious group is small. The many Jehovah's Witnesses cases, upon which so much of today's laws of religious liberty is based,[3] involved a small religious group. Sabbatarians protected in *Sherbert* are likewise comparatively few in number. It is unlikely that more than a handful of Americans share the religious convictions of the woman whose refusal to serve on a jury was vindicated in *Jenison.* The religious convictions of the young men in the conscientious objector cases (*United States* v. *Seeger,* 380 U.S. 163 (1965), *Welsh* v. *United States,* 398 U.S. 333 (1970)) were all individualistic.

The applicable principle in resolving the clash of competing interests in these cases is based upon a recognition that the freedoms secured by the First Amendment are our most precious heritage as a nation. It is because of this recognition that, when our courts consider the validity of legislation regulating rights secured by the Amendment, they do not apply the usual strong presumption of constitutionality applicable to other types of legislation. They give effect rather to "the preferred place given in our

3. See, Waite, *The Debt of Constitutional Law to Jehovah's Witnesses,* 28 Minnesota Law Review 213 (1944).

scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts,* 321 U.S. 158, 164 (1944). As the Court said in *Barnette* (319 U.S. at 639):

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

This principle was reaffirmed in *Sherbert,* where the Court said (374 U.S. at 406):

> We must * * * consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Thomas v. Collins, 323 U.S. 516, 530. * * *

This Court has been diligent in protecting the religious liberty secured by the First Amendment. Interests which the state would seem to have a clear right to protect have been held subordinate. Government power to prevent fraud,[4] preserve the cleanliness of streets,[5] regulate high-

4. *United States* v. *Ballard,* 322 U.S. 78 (1944); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

5. *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *Martin* v. *Struthers,* 319 U.S. 141 (1943).

way traffic,[6] raise revenue,[7] require overt manifestation of loyalty,[8] maintain a system of unemployment compensation,[9] and provide for juries in courts,[10] are all subject to restriction when their exercise interferes with religious liberty. Even the rights of an owner to determine who shall enter upon his property may be subordinate to the free exercise of religion.[11]

What interests of the state are so compelling as to justify infringement of the respondents' First Amendment rights? Presumably, they are the integrity of the state's public educational system at the secondary level to insure an educated citizenry and its obligation as *parens patriae* to protect what it deems the welfare of persons who are legally minors.

We submit that nothing in the record establishes a danger to either of these interests of such gravity and immediacy as justifies the substantial infringement of freedom of religion which enforcement of the statute against the respondents entails.

In respect to the integrity of the state's secondary school system we can see no danger to it more serious than that to the integrity of South Carolina's unemployment

6. *Cantwell* v. *Connecticut, supra; Kunz* v. *New York,* 340 U.S. 290 (1951).

7. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Follett* v. *McCormick,* 321 U.S. 573 (1944).

8. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 643 (concurring opinion of Mr. Justice Black).

9. *Sherbert* v. *Verner, supra.*

10. *In re Jenison, supra.*

11. *Marsh* v. *Alabama,* 326 U.S. 501 (1946).

compensation system in *Sherbert* or Minnesota's judicial system in *Jenison*. In the *Gobitis* case, the Court upheld the enforcement of the flag salute regulation against a claim of right to exemption under the Free Exercise Clause. In *Barnette*, it stated that the issue was not one of the right to religious exemption but rather the power of the state under the Freedom of Speech guaranty to compel anyone, irrespective of religious beliefs, to salute the flag, and ruled that the state had no such power.

No similar claim is made in the present case. The power of the state to require attendance at secondary school generally is not challenged. All that is asserted is that those whose religious convictions do not permit attendance beyond the elementary school level or attainment of the age of fourteen may not be compelled to violate their conscience by attending. The number of these is so small as to be of insignificant effect: a few Old Order Amish, a few Hassidic Jews (who like the Amish, maintain a strong commitment to traditional customs and practices),[12] perhaps a few others. All in all they cannot amount to more than a fraction of one percent of the population, certainly far less than the number of Jews, Seventh Day Adventists and other Sabbatarians whose right to exemption from the requirement of accepting work was upheld in *Sherbert*.

In assessing the gravity and immediacy of the danger to the state's interest in the present cases as compared to that in *Sherbert*, it is important to note that there was a real factor of possible fraudulency in that case which is

12. See *People* v. *Donner*, 199 Misc. (N. Y.) 643, affirmed 278 App. Div. 705, affirmed 302 N. Y. 857, appeal dismissed 341 U.S. 884 (1951).

not present here. It was not unreasonable for the State of South Carolina to fear that substantial numbers of claimants might misrepresent their religious beliefs in order to qualify for benefits without accepting employment. Public secondary education, however, is a highly valued privilege that is free and the state's child labor laws operate as an effective deterrent to parents who might be tempted falsely to claim religious exemption in order that they may send their children to work in factories. There is, therefore, little motivation for fraud and no reason to believe that the state cannot effectively deal with the rare case of fraud that might arise.

It is also significant that although the motivation for misrepresenting religious beliefs to avoid military service is obviously a strong one, far stronger than motivation to evade secondary education, Congress has not found the task of preventing fraud unmanageable; nor has it found it necessary to abolish or even limit the exemption, even though the interest of national defense is one of great importance.

Finally, we note in respect to the state's interest in an educated citizenry, that in enacting the Civil Rights Act of 1964 Congress decreed that completion of six years of education shall be deemed sufficient to satisfy literacy requirements for voting, and that in the Voting Rights Act of 1970 (42 U.S.C. §1973a(b)) it abolished all literacy requirements. This indicates that at least in the area of voting for those who are to govern our nation, Congress has determined that a formal education is not indispensable. Certainly, an education which includes eight years of schooling is adequate to assure the informed citizenry upon which a democracy depends.

Nor is the state's interest as *parens patriae* any more compelling in the present cases. We are aware, of course, that where the welfare of children is concerned the Court has followed a policy of allowing the legislative branch of government wide discretion even where First Amendment rights are asserted. *Prince* v. *Massachusetts, supra; People* v. *Donner, supra; People ex rel. Wallace* v. *Labrenz,* 411 Ill. 618, certiorari denied 344 U.S. 824 (1952). But the power of the state is not unlimited; it does not include the right to compel parent and child to elect in all cases the temporal to the exclusion of the eternal.

In *Meyer* v. *Nebraska, supra,* the Court rejected a claim that the welfare of children justified a statute forbidding the teaching of a foreign language to children who had not completed eight years of elementary schooling. In *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court invalidated a statute whose purpose and effect was to outlaw parochial schools. Even if education obtained by children at a state conducted school were superior, measured by mundane standards, to the education obtained at many parochial schools, would a legislative finding to that effect have resulted in a contrary decision? A Jehovah's Witnesses child who alone in a school refuses to salute the flag undoubtedly suffers emotionally. Would a legislative finding to that effect have resulted in a contrary decision in *Barnette*? If a legislature were to find that some religious teaching has a damaging effect upon the emotional and intellectual development of children, would that fact justify censorship of religious teaching? Christian Scientists and members of other denominations believe that the proper remedy for illness is not medicine but faith and prayer.

Most Americans disagree; but does that fact empower a legislature to forbid parents to teach their children the efficacy of prayer?

The answer to these questions is undoubtedly no, and the reason is that a legislature's power to promote what it deems to be the welfare of children is not beyond judicial scrutiny nor outside the boundaries of the First Amendment. The exercise of religion necessarily entails certain risks to material interests, even those of children. The First Amendment, however, mandates that parents may take these risks so long as it is not established by clear and convincing proof that the risk is grave and the danger immediate. The Wisconsin Supreme Court found that no such proof had been presented, and nothing in the record or in other sources of information which the Court may judicially note impairs the validity of the Wisconsin Court's finding.

II

Other interests entitled to constitutional protection support the decision appealed from.

A. Pluralism in a Democratic Society

Concededly the beliefs of the Old Order Amish are unconventional and their practices do not conform to generally accepted standards. Their clothes, like those of some Hassidic Jews, may seem strange to most Americans. Their simple, agricultural life in a highly industrialized nation and era, may seem even stranger. But the First Amendment ban on laws respecting an establishment of religion or prohibiting its free exercise manifested an in-

tention to accord constitutional protection to the nonconforming and unconventional religions, those which are not part of the general establishment. Indeed, the philosophy underlying the First Amendment was that religious diversity was not something to be merely suffered but to be welcomed. "We wanted a land," in the words of Mr. Justice Douglas, "where our people can be exposed to all the diverse creeds and culture of the world."[13] Uniformity of religious opinion, said Jefferson, was no more desirable than uniformity of face or stature.[14]

Religious pluralism insures domestic tranquility. "In a free government," said the author of the First Amendment, "security for civil rights must be the same as that for religious rights; it consists in the one case in a multiplicity of interests and in the other in a multiplicity of sects."[15]

There was a time, particularly after World War I, when nationalism was at its height and uniformity, political, religious and cultural, was deemed a greatly desired end. It was the era that was committed to the melting-pot theory whereby persons of different nationalities and cultures were transformed into the "American type." It was in this period that Congress enacted an immigration law containing a national origins quota system whose purpose

13. *Dennis* v. *United States,* 341 U.S. 494, 585 (1951) *dissent.*

14. In Notes on Virginia, Blau, *Cornerstones of Religious Freedom in America,* Revised edition, p. 82.

15. Quoted in 1 Stokes, *Church and State in the United States,* p. 348. Voltaire had written: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness." Quoted *ibid.*

it was to exclude persons from eastern and southern Europe, whose ethnic and cultural backgrounds were deemed too radically different from the Anglo-Saxon norm. It was the period in which states enacted statutes seeking to outlaw or make difficult the establishment of private schools or the teaching of foreign languages.

The decisions of this Court recognized then that insofar as American citizens were affected, cultural uniformity could not constitutionally be imposed coercively.[16] But even in the area of immigration, where the plenary powers of Congress are subject to little if any judicial restraints,[17] the elimination of the national origins quota system[18] testifies to a radical change in national policy. We now recognize that unity and uniformity are not synonymous; that

16. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1925); *Farrington* v. *Tokushige*, 273 U.S. 284 (1927). *Cf. Stainback* v. *Po*, 336 U.S. 368 (1949). In the *Pierce* case, the Court found itself unimpressed by the following argument made by the attorney general of Oregon:

> The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens. At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?

17. *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950).

18. Immigration Act of 1965.

unity may lie in diversity; that we are a nation not only of people but of peoples; that American culture is a plurality of cultures.

Implicit in this controversy between the Old Order Amish and the State of Wisconsin is the extent to which the Constitution protects cultural pluralism. Economic, religious and other considerations make it impracticable for the Old Order Amish to establish a conventional parochial school system on the secondary level, leaving them with no alternative, should this Court reverse the Wisconsin court's decision, but to send their children into the public high schools as they now attend public elementary schools. Many Amish parents feel that in the view of their Church excessive contact with modern education would divert their children from Amish religious and farm life.[19] It is quite possible that if all Amish children were compelled to attend public school until the age of sixteen, on the threshold of both marital and college life, the result would be the assimilation of the Amish youth and the consequent disappearance of the Amish community culture.[20]

As we have noted, immigration laws, anti-private school laws and anti-foreign language laws have been used in efforts to achieve cultural uniformity. Even zoning laws have been used for that purpose. Thus, in 1948, at Mt. Kisco, N. Y., the application of a former European Talmudic college for a zoning permit to conduct a vocational training school in connection with its seminary was opposed

19. See Record, p. 12, in *Garber* v. *Kansas*, 389 U.S. 51 (1966).

20. The fear of assimilation was a major factor in the establishment of the Catholic parochial school system and remains today one of the frequently asserted reasons for the maintenance of the Jewish day school system.

because of the students' and teachers' strange (Hassidic) clothes and hair style and because the instruction was given in the Yiddish language. *N. Y. Times,* November 27, 1948 (editorial page). In the present case, a compulsory school attendance law, even if not so intended, may well have the same effect should this Court allow it to be used against the Old Order Amish. Even if cultural uniformity within the United States were a desirable goal, the Constitution, we submit, does not permit it to be achieved by coercion.

B. Parental Rights and Family Privacy

Little need be said respecting the high estate held by parental rights in our hierarchy of values. In *Prince* v. *Massachusetts,* the Court, citing *Pierce,* recognized that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations which the state can neither supply nor hinder." 321 U.S. at 166.

It is hardly disputable that standards of public interest and public welfare have been advancing and continue to advance. We are living in what may be in part a welfare state. Compulsory school attendance originally envisioned only sufficient schooling to prepare children to be able to earn a livelihood. Later it was extended to encompass a full elementary school career and today reaches completion of secondary school or attainment of the age of sixteen. It is by no means impossible that within the next decade or two it may extend through college or at least junior or community college. It is, however, one thing to make higher education freely available to all who wish and can take

advantage of it; it is something entirely different to compel them to do so.

The Court has understandably manifested in recent years great reluctance to interfere with legislative discretion in the arena of social welfare. Yet such discretion may not be constitutionally unlimited, at least where it collides with familial privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The Court is not here faced with a case where parental sovereignty directly and immediately threatens the health, security or welfare of a child as where the parents allow it to engage in adult labor or deprive it of needed medical attention (*Prince* v. *Massachusetts, supra; People ex rel. Wallace* v. *Labrenz, supra*). There is nothing in the record in these cases to support an inference that Amish children are less happy or secure than those raised in conventional religions. We do not therefore have here a situation where the circumstances clearly call for state intrusion into the privacy of the family as the only means of preventing grave injury to children.

The right of privacy, the right to be let alone, is precious in a democratic society. The Constitution protects freedom of association (*National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449 (1958); can it be said that it does not protect equally the freedom of non-association? The effect of the statute as applied in these cases is to compel Amish children to associate with non-Amish during their school years up to the age of sixteen. The rationale of *Pierce* is that such compulsory association is constitutionally impermissible. If the State of Wisconsin may compel Amish of the ages of

fourteen and fifteen to associate with other children within the four walls of a school building six hours a day and five days a week, why may the State of Oregon not compel Catholic children to associate with non-Catholics within the four walls of a public school building during the same period of time?

In the Amish community the family is a closely knit, cohesive unit. It impinges on the right of no other individual or group. It asks only to be let alone. No doubt many Americans consider it an anachronistic vestige of a primitive simple society (as other Americans no doubt consider Hassidic Jews to be). Yet, can it be held that its right to be let alone is entitled to no constitutional protection? Can it be held that the state may intrude upon the privacy of the family in the absence of clear proof of compelling necessity?

In *People ex rel. Sisson* v. *Sisson*, 271 N.Y. 285 (1936), the New York Court of Appeals wisely said:

> * * * The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as seriously to affect the health or moral welfare of children should the courts be called upon to act.

While the Court of Appeals stated this as a guide for the exercise of judicial discretion, we submit it is equally valid as a mandate for legislative restraint in intruding upon the privacy of family life.

C. The Rights of Mature Minors

We are not in these cases faced with the difficult problem arising when there is a division within the family as to the religious upbringing of children.[21] Nor are we faced with the equally difficult problem arising from a division between parents and child. In none of the cases before the Court is it suggested that there is any conflict between the respondents and their children regarding the latters' continuance in school. The controversy before this Court is one between youths of 14 and 15 on the one hand and the State of Wisconsin on the other as to their right to participate (with their parents) in the making of a decision which the State concedes they may make a year or two later.

In the Jewish tradition, the age of maturity for decision making in matters of faith is thirteen. From that time on one is deemed the equal of all adults in membership in the Congregation of Israel and is equally responsible for his decisions as a member of that Congregation.

The common law designated the age of twenty-one as the termination of legal infancy, but that was simply the adoption of the age of eligibility to knighthood in the feudal system,[22] and even at common law a youth of 14 could legally indenture himself as a servant.[23]

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21. *Matter of Auster* v. *Weberman,* 198 Misc. (N.Y.) 1055, affirmed 278 App. Div. 656, affirmed 320 N.Y. 855, appeal dismissed 342 U.S. 884 (1951) (parents); *People ex rel. Portnoy* v. *Strasser,* 303 N.Y. 539 (1952) (parent and grandparent).

22. 2 F. Pollock and F. Maitland, *History of English Law* 438 (1968).

23. *Ibid.* 436-437.

Today there are few vestiges of common law concepts of infancy. By judicial decisions and by statute persons under the age of 21 are made responsible for many of their decisions and are recognized as entitled to make those decisions. On attaining the age of eighteen a youth must register for military service and by virtue of the Twenty-Sixth Amendment has the right to participate in deciding who shall govern the nation and the states. And, as indicated, even in Wisconsin at the age of sixteen he has the right to terminate his schooling.

We do not contend that a youth of fourteen or fifteen has a constitutional right to make for himself all the decisions he could make if he were twenty-one. We contend only that in the light of contemporary knowledge and standards, he does have a right to participate in deciding the extent of his education, and that this right is within the ambit of the Free Exercise Clause, the Due Process Clause and the Ninth Amendment. We contend further that this right merits substantial consideration in the judicial resolution of the clash of competing interests involved in the present cases. We suggest too that in weighing these interests consideration must be given to the psychological hurt suffered by these youths if they are forced by law to engage in a practice which they believe to be against the will of God and inimical to their own salvation.

In sum, we submit that when the factors of freedom of religion, pluralism, parental rights and family privacy, and the rights of mature minors are at stake, a very strong case must be made to establish a compelling state interest sufficient to outweigh them. We submit further that the State of Wisconsin has failed to make such a case.

Conclusion

For the reasons stated, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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September, 1971

...RT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-110

STATE OF WISCONSIN, *Petitioner*

v.

JONAS YODER, ET AL., *Respondents*

On Certiorari to the Supreme Court of the State of Wisconsin

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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v.

JONAS YODER, ET AL., *Respondents*

On Certiorari to the Supreme Court of the State of Wisconsin

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Jewish Commission On Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox

Jewish Community on matters of public concern. The Commission is deeply committed to the preservation of constitutional right for all Americans, and in particular to the principles of the First and Fourteenth Amendments in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. Essential to the protection and preservation of these rights is the effective implementation of the Free Exercise Clause of the First Amendment. That Clause—unfortunately eclipsed by this Court's recent concern with the same Amendment's Establishment Clause—prohibits unwarranted and unnecessary restraints upon religious practice and belief. In our view, it was designed by the Founders of our Nation to preserve and foster the pluralistic quality of American society, an aspect of its heritage which goes back to the settlement of this continent almost four centuries ago. We believe that it is important, at this time in the nation's history, that this Court reaffirm that principle and thereby stem an alarming and ever-increasing tide of private and governmental hostility to, and discrimination against, religious nonconformists. The promise of the Bill of Rights and the proud origins of the United States permit no less.

QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment permits the punishment of Amish parents who refuse, on religious grounds, to send their children to high school as directed by a Wisconsin statute which requires "any person having under his control a child who is between the ages of 7 and 16 * * * [to] cause such child to attend school regularly * * *."

ARGUMENT

THE FREE EXERCISE CLAUSE BARS ENFORCEMENT OF WISCONSIN'S COMPULSORY EDUCATION LAW AGAINST PARENTS WHO REFUSE, FOR REASONS OF CONSCIENCE, TO SEND THEIR CHILDREN TO HIGHSCHOOL BUT PROVIDE THEM WITH AN INFORMAL "LEARNING BY DOING" EDUCATION WITHIN THEIR RELIGIOUS COMMUNITY

The constitutional issue presented by this case—as it emerges from the record made in the trial court—is whether the State of Wisconsin may compel Amish parents to conform to the State's view of a proper or desirable education for children beyond the eighth grade. We believe that the Free Exercise Clause of the First Amendment—as it has been applied in this Court's decisions—forbids Wisconsin to coerce conformity of this kind over sincerely held religious convictions, and that the constitutional mandate requires the State to accommodate its generally applicable educational requirements to the legitimate and nonharmful needs of the Amish religious community.

We emphasize, at the outset, what this case does *not* involve. It is not a case in which parents are claiming the right to keep their highschool-age children from school in order to put them to work in commercial or fund-raising ventures or to free them for frivolous or nonproductive activity. Nor is it a case in which parents have been prompted by purely social, philosophical or economic differences with a public school administration to remove their children from the system. This case concerns parents whose religious convictions have led them to conclude that acceptance of the form of school prescribed by the State officials would "endanger" their "salvation * * * [in] an eternal world which is believed to be ahead" (App. 118). And instead of sending their children to the

public highschool—which would teach them values and provide "temptations" viewed as harmful and corrupt by the Amish (App. 117, 121)—or to a private school in a format acceptable by the State authorities, these parents believe in "learning by example" (App. 118) and in "learning by doing" (App. 125). Hence the constitutional issue is whether their religious convictions may be overridden by the State's judgment that the only proper format for a highschool education is the traditional one—*i.e.*, in a school building, with the use of traditional learning tools such as books and blackboards, and with a prescribed curriculum of academic subjects.

A. Wisconsin Must Prove a "Compelling State Interest" in Forcing Amish Parents To Forgo the Kind of Education of Highschool-Age Children Which Their Faith Commands.

This case involves, as did *West Va. Board of Education* v. *Barnette*, 319 U.S. 624 (1943), the assertion of a right by the defendants which "does not bring them into collision with rights asserted by any other individual." 319 U.S. at 630. Here, as was true in *Barnette*, "the sole conflict is between authority and the rights of the individual." *Ibid.* And, as Justices Black and Douglas (who in *Barnette* reversed the positions they had taken three years earlier in *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940)) observed in their *Barnette* concurrence, the controlling question must be whether the State's laws meet the standard of the Religion Clauses of the First Amendment—*i.e.*, whether they "permit the widest toleration of conflicting viewpoints consistent with a society of free men." 319 U.S. at 644.

The Court's majority opinion in *Barnette* noted that it was a "fixed star in our constitutional con-

stellation * * * that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. And the concurrence of Justices Black and Douglas defined the governing criteria in deciding whether State laws inhibiting "the substance of religious tenets and practices" was permissible as whether they are "imperatively necessary to protect society as a whole from grave and pressingly imminent dangers * * *." 319 U.S. at 643-644.

This was essentially the same standard as this Court applied in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Recognizing the teaching of some prior decisions that "governmental regulation of certain overt acts prompted by religious beliefs or principles" may be permissible, the Court defined the borders of that area in the following terms: "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." 374 U.S. at 403.

Here, as in *Sherbert,* the conduct at issue presents no such danger. If any harm is caused by the absence of Amish children from public or private highschools in Wisconsin, it is not to "public safety, peace or order." Indeed, the only claim made by the State is that the children themselves are harmed—a claim which we treat more fully below (pp. 10-15, *infra*). Hence the sole available constitutional justification for requiring Amish parents to violate their religious convictions or be subject to criminal penalties would be the existence of a "compelling state interest" within the meaning of *Sherbert* and *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

B. Standardization and Homogeneity of Education Is Not a Permissible—Much Less Compelling—State Interest.

In early decisions not even invoking the Free Exercise Clause of the First Amendment, this Court unequivocally rejected claims of State authorities that they could compel institutions of learning within their borders to conform to models which the State authorities deemed desirable. In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), and *Bartels* v. *Iowa,* 262 U.S. 404 (1923), the Court declared unconstitutional local statutes designed to prohibit the teaching of modern foreign languages in public or private schools. Recognizing the legitimate "desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civil matters" (262 U.S. at 402), the Court held that the law violated the fundamental Fourteenth Amendment rights of the parents of schoolchildren and that it was "arbitrary and without reasonable relation to any end within the competency of the State." *Id.* at 403.

In *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), again without reliance upon the rights of free exercise of religion, the Court held unconstitutional an attempt by the State "to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. Recognizing in *Farrington* v. *Tokushige,* 273 U.S. 284 (1927), that what purported to be a statute regulating foreign language schools in Hawaii actually gave "affirmative direction concerning the intimate and essential details of such schools, intrust[ed] their control to public officers, and den[ied] both owners and patrons reasonable choice and discretion

in respect of teachers, curriculum and textbooks" (273 U.S. at 298), this Court affirmed an injunction against the law's enforcement on the ground that "it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." *Ibid.*

The issues in the 1920's may have been the teaching of foreign languages and the right of private schools to exist, and those particular legal doubts may then have been laid to rest, but the underlying philosophical question is the same now as it was then—and as it was in the 1940's when the flag-salute cases came before this Court: May State officials use their authority—indeed, their obligation—to educate children as a basis for compelling uniformity and adherence to what they believe to be right notwithstanding the conscientious beliefs of parents to the contrary?[1] We submit that this Court's answer today must be what it was in the 1920's and, after some uncertainty, in the 1940's. For today—more than ever before—it is imperative that this Nation not lose sight of its greatest accomplishment—its proven ability to accommodate the diverse strains of our pluralistic society.

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[1] In the *Meyer* case, the Court noted that the rulers of ancient Sparta "in order to submerge the individual and develop ideal citizens" had "assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians." It noted that Spartan "ideas touching the relation between individual and State were wholly different from those upon which our institutions rest" and that any similar conduct by State authorities would do "violence to both letter and spirit of the Constitution." 262 U.S. at 401-402.

C. A Balancing of the Interests at Stake Shows That the Burden on the Religious Rights of the Amish Parents Substantially Outweighs the Conceivable State Interests.

The major argument made by Wisconsin in answer to the Amish parents' claim that the statutory requirement inhibits the free exercise of religion is that the State, as *parens patriae* for the children of the Amish, may impose conditions which "benefit" the children notwithstanding the parents' objections. But if the State's legitimate interest is subjected to close scrutiny, it becomes clear that it does not approach the gravity and importance of the burdens on the private constitutional right.

1. The Burdens Cast Upon the Amish Parents.

We begin by noting that the Amish parents are affected directly and immediately by the Wisconsin requirement; it commands them, under pain of fine or imprisonment, to perform acts squarely contrary to their religious beliefs—sending their children of high-school age to a formal school. In this respect, their interest in exemption is weightier even than that asserted in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where the consequences to religious practice were "an indirect result of welfare legislation within the State's general competence to enact." 374 U.S. at 403. The Court there noted that Miss Sherbert's claim was weaker in this regard than if "criminal sanctions directly compel[led] appellant to work a six-day week." *Ibid.* And the same analysis led the Court to reject a Sabbath-observer's challenge to a Sunday Closing Law in *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), on the ground that the law "simply regulates a secular activity and, as applied to appellants, operates so as

to make the practice of their religious belief more expensive." 366 U.S. at 605.

This case involves what *Sherbert* and *Braunfeld* did not—a statute confronting religious believers with "as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecutions." 366 U.S. at 605. And this factor has grave implications for the constitutional issue because it means that if the belief is sincerely held (as is stipulated on this record), the State will never be able to obtain compliance with the command of its law. For while the individual believers in *Sherbert* and *Braunfeld* could conform to the challenged State statutes at some expense or inconvenience, the plaintiffs in this case—forced to choose directly between earthly laws and divine command—have no real option but to follow the latter. Consequently, the rigid enforcement of the State's law—if permitted—simply means that the Amish community will be subjected to repeated criminal sanction or will leave Wisconsin as, it appears from Appendix A to Respondents' Brief in Opposition, they left Arkansas and other States.

A second compelling aspect of the Amish parents' right is the pervasive and lasting nature of the inroad which Wisconsin's enforcement of its statute makes upon their religious life. The expert testimony in the record demonstrates how essential to Amish belief and practice is the religious community's separation from the rest of the world (*e.g.*, App. 109-110, 116, 119, 121). That view is one for which this *amicus* has great understanding. The Biblical command is clear (*Leviticus* xx: 23): "And ye shall not follow the customs of the nations, which I am casting out before you . . . ." And a large part of the Orthodox

Jewish community is distinctive from the world around it by reason of religious restrictions on permissible foods, days of labor, manner of dress and, most importantly, the education of its children.

What Wisconsin asks of its Amish is more than a minor adjustment to modern society. The statute in *Prince* v. *Massachusetts*, 321 U.S. 158 (1944)—which we discuss more fully below—as well as those in *Sherbert* and *Braunfeld* made that kind of small demand on religious believers. Obviously, the future of the religious community was not seriously jeopardized by the administration of an absolute prohibition on child labor or on Sunday sales. Nor would the future of the faith of Seventh Day Adventists have been endangered if South Carolina had been permitted to deny unemployment compensation benefits to those who refused to work on Saturdays for religious reasons.

The only expert who testified regarding the Amish in this record stated that "if the Amish youth are required to attend the value system of the high school as we know it today, the church-community cannot last long, it will be destroyed" (App. 116). Hence the implementation of the State's policy in this case strikes at the heart of the religious faith by undermining its very existence and survival. Such a result should not be permitted unless the danger sought to be avoided is so severe that the State has no choice. We turn now to that question.

2. The Interests of the State.

There is, of course, a strong, valid and permissible State interest in the education of children residing within the State. Wisconsin's brief in this Court relies

almost exclusively on that interest and proceeds on the premise that exemption from its compulsory school-attendance law necessarily gives rise to "the dangers of ignorance" (Pet. Brief, 10-12). In actual fact, the State's interest cannot be framed in terms of these extremes, for the record belies the suggestion that if Amish parents are granted exemption from Wisconsin's law, their children will be "ignorant." The results of a study of Amish children commissioned by the United States Office of Education, which were introduced into the record at respondents' trial (see App. 120), rebut any such claim. The study shows that the achievement level of Amish children who did not attend formal highschools is no lower than that of other children.

Similarly, the record overwhelmingly answers the State's argument that its form of education "assuredly helps to prevent crime. . . ." (Pet. Brief 14). The testimony of the Sheriff and the local director of the Department of Social Services established that, even without the benefit of such education, neither crime nor indigence is found among the Amish (App. 121-122).

And the compulsory education law itself indicates that its command is not intended to be universal. Sections 118.15(3) and 118.15(4) of the law (Pet. Brief 6) permit exceptions from school attendance "for good cause" and substitute instruction if the state superintendent finds it "substantially equivalent." If the State can recognize exemptions for child stage-actors or others who must travel or work during school hours, why should it not also be required to recognize the

exemption claim of those who have a religious reason for refusing to attend?[2]

Ultimately, however, the State's claim comes down to its assertion that its administrators are more qualified and competent to decide what is best for the children of the Amish than their parents. That argument is squarely made at pages 20-21 of Wisconsin's brief, wherein it argues that the State must give the children the "benefit" of formal highschool education notwithstanding the "neglect" of "parental duty" by the adult Amish. This simplistic assertion overlooks the purpose of education, which is to equip children for their adult lives. Assuming, as seems reasonable on this record, that a large majority of Amish children will spend their adult lives within the church-community of their elders, is the State's educative objective realized by forcing upon them concepts and values which serve no purpose in that context and may, in fact, be harmful?

Surely the notion that a State may take over as *parens patriae* to give children an option for ways of life other than those fostered by their parents is contrary to our traditions and may infringe on Fourth Amendment rights of privacy or on the constitutionally penumbral right sustained in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Parents make countless choices

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[2] An additional general indicator of the insubstantiality of the State's interest is the admission by the Public School District Administrator that he instituted the present proceedings substantially in retaliation for the Amish parents' removal of their elementary-school children from the public schools before the census was taken for State revenue purposes. Accordingly, the school district lost "in the vicinity of $18,000" and the administrator "brought the criminal complaint in the present action" (App. 114). Plainly, the harm to the State could not have been too great if it was only on this account that proceedings were begun.

for their children which permanently affect their future lives, and the choice of faith is foremost among them. For the State to intrude into that choice under the guise of offering a "benefit" to the child is to permit it to meddle in the most private and sacred of human affairs.

It is no answer to say—as the dissenting judge did below—that religious liberty may be preserved if the Amish establish a private school consistent with their beliefs (App. 148-151). Such a school, which has apparently been coerced by methods described by the dissenting judge as "gestapo tactics" in States other than Wisconsin, is described by the dissenter as "an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires" (App. 149). If that is the kind of education with which the State will be satisfied, it is all the more proof of the insubstantiality of its interest. For why should the Amish be forced to send their children to a schoolhouse to sit at desks and learn reading, agriculture, husbandry and religion from an instructor who stands at the head of the class when, by the evidence introduced below, all these subjects other than reading are taught in more practical ways in the Amish community in a nonstructured manner—and reading has been taught in the elementary grades. If this is the "benefit" of private education that this case is about, it establishes that the State's only concern is form, not substance, and that it can be satisfied if the Amish are willing to surrender their religious principle to empty formalism and to pour their traditional education into the mold which the State authorities approve.

There is, finally, no substance whatever to the claim that this case is controlled by *Prince* v. *Massachusetts,*

321 U.S. 158 (1944). The Court in *Prince* permitted Massachusetts to prohibit street-preaching by children under its comprehensive child labor law on findings that there was harm to children "arising from * * * activities subject to all the diverse influences of the street" and that "the right to engage in propagandizing the community * * * may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury." 321 U.S. at 169-170. On this basis the Court concluded that while "[p]arents may be free to become martyrs themselves * * * it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Ibid.* In this regard, the Court relied heavily on the State's authority over children in "public activities and in matters of employment." 321 U.S. at 168. Justices Jackson, Roberts and Frankfurter agreed with the result in *Prince* on the ground that the case involved not "religious activities which concern only members of the faith," but a collision with "liberties of others or of the public" in that it related to "money-raising activities on a public scale." 321 U.S. at 177-178.

None of these considerations is present here. Wisconsin cannot claim that exemption from attendance in a formal high school injures the health of a child, makes a "martyr" of him, or endangers society. Nor is the attempt to force Amish parents to establish a private Amish school a form of regulation of the "public activities" or "employment" of children. Rather, the subject of regulation here is "the custody, care

and nurture of the child," which the Court recognized in *Prince* as residing with the parents, "whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166.

CONCLUSION

This case presents a disturbing illustration of an attempt by State authorities to compel nonconformists, whose beliefs and practices are constitutionally protected, to adhere to norms which may be entirely sound and desirable for most inhabitants of this country but which are offensive and harmful to the affected religious minority. Neither the record in this case nor common experience justifies the imposition of these restrictions, which are prompted more by an interest in symmetry than by any reasoned policy. The Constitution and the traditions of this Nation do not permit this kind of coercion, which endangers all religious or ethnic minorities. Accordingly, the decision of the Supreme Court of Wisconsin which rejected the State's effort to impose its will on the Amish parents, should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

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FILED
DEC 8 1971
E. ROBERT SEAVER, CLERK

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ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR THE PETITIONER

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IN THE

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. The Issue Is Not Whether The Amish Society's Way Of Life Measures Well Compared With Society's In General, But Rather Is: Whether Any Segment Of Society Under A Claim Of First Amendment Right May Decide For Itself That It May Refuse To Abide By Fundamental Standards That Society Has Developed And Established?

Respondents dwell, at length, upon the Amish way of life and upon its virtues. From this, respondents argue that it would not be against society's interest to grant an exemption to the particular segment of society here involved from society's compulsory school attendance law.

Respondents' argument ignores the fact that *if* an exemption is required for the segment of society involved in this case, it must be required legally for any segment of society (or all segments of society) that claim a conscientious belief that requires that adherence to society's minimum fundamental standards be ignored.

Respondents' argument also ignores the legal effect of the rule it seeks from this court under a claim of first amendment right, — that an exemption from society's compulsory school attendance law for two years is legally indistinguishable from an exemption for four years, or six, or more.

It is common knowledge that the curricula and methods of teaching are constantly subject to change. What the Amish object to as "worldly" in the ninth grade may next year be present in the curriculum or environment of the eighth grade, and the following year in the seventh grade.

The distinction between elementary and secondary schools is artificial and in some instances meaningless. It is only the Amish and the Wisconsin Supreme Court that seem to see a profound difference between eighth and ninth grade.

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary/1 long ago established that children could be required to attend school provided that they or their parents were not restricted in their choice to a public school. Respondents have made no effort to bring themselves under this protection offered by sending their children to private parochial schools.

This court first was confronted with this problem in cases involving the Morman religion. In *Reynolds v. United States* (1878), 98 U.S. 145, 25 L.Ed. 244, the court established the principle that while the right to believe is absolute, the right to act is not.

II. The State Is Not Required To Prove, In A Trial Involving A Violation Of Its Compulsory School Attendance Law, Sec. 118.15 (1), Wis. Stats., That Its Minimum Standards For Education Are Superior To The Standard The Accused Wishes To Pursue.

Respondents extol the merits of *their* way of life and the fact that *their* standards for education prepare their young for this way of life, and then argue that the State failed to prove, at the trial court level, that the State's compelling interest in education was superior to the rights of the Respondents.

This argument assumes that whenever society wishes to prosecute any person, or group of persons, for a violation of society's basic standards, that society must, as a matter of

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/1 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)

proof, show that its standards or minimum requirements are correct. We do not perceive this to be the law of the land.

If the standards are wrong, the legislature is the proper forum in which to seek relief.

Respondents rely heavily on that portion of the decision of the Wisconsin court which states that the "record filed fails to disclose a compelling interest in education."

This court has reiterated on numerous occasions the fundamental importance of education to society and the individual. *Brown I*/[2], *Board of Education v. Allen*/[3], *Everson v. Board of Education*/[4], *West Virginia v. Barnette*/[5].

Respondents and the Wisconsin Supreme Court misconceive the character and depth of analysis of the interests of society and the individual required in this instance. We believe the following from *Gillette v. United States*/[6] to be cogent to this issue:

> "Nonetheless, our analysis of § 6(j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.
>
> "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a

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/[2] Brown v. Board of Education of Topeka (1954), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

/[3] 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed. 2d 1060

/[4] 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947)

/[5] 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)

/[6] — U.S. —, 91 S.Ct. 828, 28 L.Ed. 168 (1971)

democratic government. See Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643 (1905); cf. Cleveland v. United States, 329 U.S. 14, 20, 67 S.Ct. 13, 16, 91 L.Ed. 12 (1946). To be sure, the Free Exercise Clause bars 'governmental regulation of religious *beliefs* as such,' Sherbert v. Verner, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed. 2d 965 (1963), or interference with the dissemination of religious ideas. See Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953); Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)."

In *Reynolds v. United States* (1878), 98 U.S. 145, 25 L.Ed. 244, this court announced that a segment of society could not, in the name of religious freedom under the First Amendment, avoid compliance with society's law prohibiting polygamy. In that case, society was not required to prove its interest in preserving monogamy. However, this court in reviewing the historical and social values involved, had no problem in recognizing society's interest.

It is difficult to perceive many concerns of society more fundamental and compelling than education. Man is a social being and society, because of that very fact, has an interest in the education of the young:

Mr. Justice White, in the recent case of *Lemon v. Kurtzman*[7] said, loc cite, 29 L.Ed. 2d 783:

> "It is our good fortune that the states of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental function,

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[7] 403 U.S. 602, 91 S.Ct. 2135, 29 L.Ed. 2d 745

and not only understood secular education as a public responsibility, but also required compulsory attendance at school by their young. . . ."

It is important to remember that society recognizes the fundamental importance of education and in deference thereto has promulgated certain basic standards concerning education.

III. The Doctrine In *Sherbert* Should Not Apply Because It Has Been Modified By More Recent Conscientious Objector Cases.

The danger of applying *Sherbert* is that it was apparently modified by *Seeger*/[8] and *Welsh*/[9]. In these later two cases, this court held that exemption from conscription could not be limited to persons citing religious beliefs but must be extended to any individual claiming a seriously held moral obligation. Thus, if *Sherbert* applies in this case, so do *Seeger* and *Welsh*, and any person may conscientiously and constitutionally object to education on religious *or* moral obligation grounds. Of course, such a rule would substantially frustrate society's compelling interest in educating its young.

Thus, what the Wisconsin decision has attempted to do is to establish an exemption for Amish alone based on religious grounds. The only manner in which such an exemption could possibly carry constitutional validity is if, by act of the legislature, it is applied to all persons who conscientiously object to education. Such a right does not exist without legislative fiat.

/[8] United States v. Seeger, 380 U.S. 163, 166, 173, 13 L.Ed. 2nd 733, 85 S.Ct. 850 (1965).

/[9] Welsh v. United States, 398 U.S. 333, 26 Fed. 308, 90 S.Ct. 1792 (1970).

IV. The Doctrine In *Sherbert* Does Not Apply Because Neither Children Nor A Compelling State Interest Were Involved In That Case.

As respondents stated at page 27 of their brief:

> "This Court, in *Sherbert v. Verner,* 374 U.S. 398 (1963), provided the test which state regulation which burdens the free exercise of religion must meet: such imposition must be justified by 'a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' *Id.* at 403.[21]"

Respondents wish to apply *Sherbert.* However, respondent fails to discern important factors that distinguish *Sherbert* from the case now at bar.

First, children were not involved in *Sherbert.* As this court recognized in *Prince v. Massachusetts* (1943), 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, at pages 165-166:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U.S. 145, 25 L. ed. 244; *Davis v. Beason* (1889), 133 U.S. 333, 33 L. ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by *requiring school attendance,* regulating or prohibiting the child's labor, and in many other ways. . . . (Emphasis added.)
>
> "* * *
>
> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment.

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. . . ."

Also, see *Ginsberg v. State of New York* (1968)/[10].

And in a subsequent case that applied *Sherbert, In re Jenison* (1963), 375 U.S. 14, children were not involved.

Further, we do not perceive that compulsion for jury duty *(Jenison)* or requiring willingness to work on certain specified days of the week in order to obtain unemployment benefits *(Sherbert)* has the compelling state interest that education does.

Respectfully submitted,

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/[10] Ginsberg v. State of New York (1968), 390 U.S. 629, 88A S.Ct. 1274, (rehearing denied) 20 Fed. 2d 195, 391 U.S. 971, 88 S.Ct. 2029.

WISCONSIN *v.* YODER ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 70–110. Argued December 8, 1971—Decided May 15, 1972

Respondents, members of the Old Order Amish religion and the Conservative Amish Mennonite Church, were convicted of violating Wisconsin's compulsory school-attendance law (which requires a child's school attendance until age 16) by declining to send their children to public or private school after they had graduated from the eighth grade. The evidence showed that the Amish provide continuing informal vocational education to their children designed to prepare them for life in the rural Amish community. The evidence also showed that respondents sincerely believed that high school attendance was contrary to the Amish religion and way of life and that they would endanger their own salvation and that of their children by complying with the law. The State Supreme Court sustained respondents' claim that application of the compulsory school-attendance law to them violated their rights under the Free Exercise Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Held:*

1. The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. Pp. 213–215.

2. Respondents have amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs. Pp. 215–219.

3. Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have

carried the difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of the overall interests that the State relies on in support of its program of compulsory high school education. In light of this showing, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Pp. 219–229, 234–236.

4. The State's claim that it is empowered, as *parens patriae*, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a free exercise claim of the nature revealed by this record, for the Amish have introduced convincing evidence that accommodating their religious objections by forgoing one or two additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society. Pp. 229–234.

49 Wis. 2d 430, 182 N. W. 2d 539, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 237. WHITE, J., filed a concurring opinion, in which BRENNAN and STEWART, JJ., joined, *post*, p. 237. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 241. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

John W. Calhoun, Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs were *Robert W. Warren*, Attorney General, and *William H. Wilker*, Assistant Attorney General.

William B. Ball argued the cause for respondents. With him on the brief was *Joseph G. Skelly*.

Briefs of *amici curiae* urging affirmance were filed by *Donald E. Showalter* for the Mennonite Central Com-

mittee; by *Boardman Noland* and *Lee Boothby* for the General Conference of Seventh-Day Adventists; by *William S. Ellis* for the National Council of the Churches of Christ; by *Nathan Lewin* for the National Jewish Commission on Law and Public Affairs; and by *Leo Pfeffer* for the Synagogue Council of America et al.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions of violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after completing the eighth grade.[1] The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law,[2] and they are conceded to be subject to the Wisconsin statute.

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[1] The children, Frieda Yoder, aged 15, Barbara Miller, aged 15, and Vernon Yutzy, aged 14, were all graduates of the eighth grade of public school.

[2] Wis. Stat. § 118.15 (1969) provides in pertinent part:

"118.15 *Compulsory school attendance*

"(1)(a) Unless the child has a legal excuse or has graduated from

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each.[3] Respondents defended on the ground that the applica-

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high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

"(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.

"(4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

"(5) Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both."

Section 118.15 (1)(b) requires attendance to age 18 in a school district containing a "vocational, technical and adult education school," but this section is concededly inapplicable in this case, for there is no such school in the district involved.

[3] Prior to trial, the attorney for respondents wrote the State Superintendent of Public Instruction in an effort to explore the possibilities for a compromise settlement. Among other possibilities, he suggested that perhaps the State Superintendent could administratively determine that the Amish could satisfy the compulsory-attendance law by establishing their own vocational training plan similar to one that has been established in Pennsylvania. Supp. App. 6. Under the Pennsylvania plan, Amish children of high school age are required to attend an Amish vocational school for

tion of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments.[4] The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish

three hours a week, during which time they are taught such subjects as English, mathematics, health, and social studies by an Amish teacher. For the balance of the week, the children perform farm and household duties under parental supervision, and keep a journal of their daily activities. The major portion of the curriculum is home projects in agriculture and homemaking. See generally J. Hostetler & G. Huntington, Children in Amish Society (1971); Socialization and Community Education, c. 5 (1971). A similar program has been instituted in Indiana. *Ibid.* See also Iowa Code § 299.24 (1971); Kan. Stat. Ann. § 72-1111 (Supp. 1971).

[3] The Superintendent rejected this proposal on the ground that it would not afford Amish children "substantially equivalent education" to that offered in the schools of the area. Supp. App. 6.

[4] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.[5]

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school and higher education generally because the values it teaches

[5] See generally J. Hostetler, Amish Society (1968); J. Hostetler & G. Huntington, Children in Amish Society (1971); Littell, Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?, in Public Controls for Nonpublic Schools 61 (D. Erickson ed. 1969).

are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing, a life of "goodness," rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than competition, and separation, rather than integration with contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing" rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into

the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning-through-doing the skills directly relevant to their adult roles in the Amish community as "ideal" and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent

record as law-abiding and generally self-sufficient members of society.

Although the trial court in its careful findings determined that the Wisconsin compulsory school-attendance law "does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief" it also concluded that the requirement of high school attendance until age 16 was a "reasonable and constitutional" exercise of governmental power, and therefore denied the motion to dismiss the charges. The Wisconsin Circuit Court affirmed the convictions. The Wisconsin Supreme Court, however, sustained respondents' claim under the Free Exercise Clause of the First Amendment and reversed the convictions. A majority of the court was of the opinion that the State had failed to make an adequate showing that its interest in "establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion." 49 Wis. 2d 430, 447, 182 N. W. 2d 539, 547 (1971).

I

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, *e. g., Pierce* v. *Society of Sisters,* 268 U. S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce,* made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing

and education of their children in their early and formative years have a high place in our society. See also *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); cf. *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations." 268 U. S., at 535.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. *Lemon* v.

Kurtzman, 403 U. S. 602 (1971); *Tilton* v. *Richardson*, 403 U. S. 672 (1971). See also *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947).

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. *E. g.*, *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *McGowan* v. *Maryland*, 366 U. S. 420, 459 (1961) (separate opinion of Frankfurter, J.); *Prince* v. *Massachusetts*, 321 U. S. 158, 165 (1944).

II

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question,[6] the very concept of ordered liberty precludes

[6] See *Welsh* v. *United States*, 398 U. S. 333, 351–361 (1970) (Harlan, J., concurring in result); *United States* v. *Ballard*, 322 U. S. 78 (1944).

allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stems from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world . . . ." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education.[7] The re-

[7] See generally R. Butts & L. Cremin, A History of Education in American Culture (1953); L. Cremin, The Transformation of the School (1961).

spondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict.[8]

[8] J. Hostetler, Amish Society, c. 9 (1968); J. Hostetler & G. Huntington, *supra*, n. 5.

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See *Braunfeld* v. *Brown*, 366 U. S. 599, 605 (1961). Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.[9]

[9] Some States have developed working arrangements with the Amish regarding high school attendance. See n. 3, *supra*. However, the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses. See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1, 9–10 (1947); Madison, Memorial and Remonstrance Against

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

III

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment.[10] But our decisions have rejected the idea that

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Religious Assessments, 2 Writings of James Madison 183 (G. Hunt ed. 1901).

[10] That has been the apparent ground for decision in several previous state cases rejecting claims for exemption similar to that here. See, *e. g.*, *State* v. *Garber*, 197 Kan. 567, 419 P. 2d 896 (1966), cert. denied, 389 U. S. 51 (1967); *State* v. *Hershberger*, 103 Ohio App. 188, 144 N. E. 2d 693 (1955); *Commonwealth* v. *Beiler*, 168 Pa. Super. 462, 79 A. 2d 134 (1951).

religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437 (1971); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Reynolds* v. *United States*, 98 U. S. 145 (1879). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. *E. g.*, *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304 (1940). This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 612 (1971).

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Sherbert* v. *Verner*, *supra*; cf. *Walz* v. *Tax Commission*, 397 U. S. 664 (1970). The Court must not ignore the danger that an exception

from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses

> "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed." *Walz* v. *Tax Commission, supra,* at 672.

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption. See, *e. g., Sherbert* v. *Verner, supra; Martin* v. *City of Struthers,* 319 U. S. 141 (1943); *Schneider* v. *State,* 308 U. S. 147 (1939).

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. See *Meyer* v. *Nebraska*, 262 U. S., at 400.

The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.[11]

[11] Title 26 U. S. C. § 1402 (h) authorizes the Secretary of Health, Education, and Welfare to exempt members of "a recognized religious sect" existing at all times since December 31, 1950, from the obligation to pay social security taxes if they are, by reason of the tenets of their sect, opposed to receipt of such benefits and agree

It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child's crucial adolescent period of religious development. Dr. Donald Erickson, for example, testified that their system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community, and that "I would be inclined to say they do a better job in this than most of the rest of us do." As he put it, "These people aren't purporting to be learned people, and it seems to me the self-sufficiency of the community is the best evidence I can point to—whatever is being done seems to function well." [12]

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is

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to waive them, provided the Secretary finds that the sect makes reasonable provision for its dependent members. The history of the exemption shows it was enacted with the situation of the Old Order Amish specifically in view. H. R. Rep. No. 213, 89th Cong., 1st Sess., 101–102 (1965).

The record in this case establishes without contradiction that the Green County Amish had never been known to commit crimes, that none had been known to receive public assistance, and that none were unemployed.

[12] Dr. Erickson had previously written: "Many public educators would be elated if their programs were as successful in preparing students for productive community life as the Amish system seems to be. In fact, while some public schoolmen strive to outlaw the Amish approach, others are being forced to emulate many of its features." Erickson, Showdown at an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy, in Public Controls for Nonpublic Schools 15, 53 (D. Erickson ed. 1969). And see *supra*, n. 5, at 61.

"right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in "ignorance." To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an "ideal" vocational education for their children in the adolescent years.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the

State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.[13] When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the

[13] All of the children involved in this case are graduates of the eighth grade. In the county court, the defense introduced a study by Dr. Hostetler indicating that Amish children in the eighth grade achieved comparably to non-Amish children in the basic skills. Supp. App. 9–11. See generally J. Hostetler & G. Huntington, *supra*, n. 5, at 88–96.

ideal of a democratic society.[14] Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed.[15] The inde-

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[14] While Jefferson recognized that education was essential to the welfare and liberty of the people, he was reluctant to directly force instruction of children "in opposition to the will of the parent." Instead he proposed that state citizenship be conditioned on the ability to "read readily in some tongue, native or acquired." Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson 417, 423–424 (Mem. ed. 1904). And it is clear that, so far as the mass of the people were concerned, he envisaged that a basic education in the "three R's" would sufficiently meet the interests of the State. He suggested that after completion of elementary school, "those destined for labor will engage in the business of agriculture, or enter into apprenticeships to such handicraft art as may be their choice." Letter from Thomas Jefferson to Peter Carr, Sept. 7, 1814, in Thomas Jefferson and Education in a Republic 93–106 (Arrowood ed. 1930). See also *id.*, at 60–64, 70, 83, 136–137.

[15] See Dept. of Interior, Bureau of Education, Bulletin No. 47, Digest of State Laws Relating to Public Education 527–559 (1916); Joint Hearings on S. 2475 and H. R. 7200 before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., pt. 2, p. 416.

Even today, an eighth grade education fully satisfies the educational requirements of at least six States. See Ariz. Rev. Stat. Ann. § 15-321 (B)(4) (1956); Ark. Stat. Ann. § 80-1504 (1947); Iowa Code § 299.2 (1971); S. D. Comp. Laws Ann. § 13-27-1 (1967); Wyo. Stat. Ann. § 21.1-48 (Supp. 1971). (Mississippi has no compulsory education law.) A number of other States have flexible provisions permitting children aged 14 or having completed the eighth grade to be excused from school in order to engage in lawful employment. *E. g.*, Colo. Rev. Stat. Ann. §§ 123-20-5, 80-6-1 to 80-6-12

pendence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

We should also note that compulsory education and child labor laws find their historical origin in common humanitarian instincts, and that the age limits of both laws have been coordinated to achieve their related objectives.[16] In the context of this case, such considera-

(1963); Conn. Gen. Stat. Rev. §§ 10-184, 10-189 (1964); D. C. Code Ann. §§ 31-202, 36-201 to 36-228 (1967); Ind. Ann. Stat. §§ 28-505 to 28-506, 28-519 (1948); Mass. Gen. Laws Ann., c. 76, § 1 (Supp. 1972) and c. 149, § 86 (1971); Mo. Rev. Stat. §§ 167.031, 294.051 (1969); Nev. Rev. Stat. § 392.110 (1968); N. M. Stat. Ann. § 77-10-6 (1968).

An eighth grade education satisfied Wisconsin's formal education requirements until 1933. See Wis. Laws 1927, c. 425, § 97; Laws 1933, c. 143. (Prior to 1933, provision was made for attendance at continuation or vocational schools by working children past the eighth grade, but only if one was maintained by the community in question.). For a general discussion of the early development of Wisconsin's compulsory education and child labor laws, see F. Ensign, Compulsory School Attendance and Child Labor 203-230 (1921).

[16] See, *e. g.*, Joint Hearings, *supra*, n. 15, pt. 1, at 185-187 (statement of Frances Perkins, Secretary of Labor), pt. 2, at 381-387 (statement of Katherine Lenroot, Chief, Children's Bureau, Department of Labor); National Child Labor Committee, 40th Anniversary Report, The Long Road (1944); 1 G. Abbott, The Child and the State 259-269, 566 (Greenwood reprint 1968); L. Cremin, The Transformation of the School, c. 3 (1961); A. Steinhilber & C. Sokolowski, State Law on Compulsory Attendance 3-4 (Dept. of Health, Education, and Welfare 1966).

tions, if anything, support rather than detract from respondents' position. The origins of the requirement for school attendance to age 16, an age falling after the completion of elementary school but before completion of high school, are not entirely clear. But to some extent such laws reflected the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938.[17] It is true, then, that the 16-year child labor age limit may to some degree derive from a contemporary impression that children should be in school until that age. But at the same time, it cannot be denied that, conversely, the 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in work that should be performed by adults.

The requirement of compulsory schooling to age 16 must therefore be viewed as aimed not merely at providing educational opportunities for children, but as an alternative to the equally undesirable consequence of unhealthful child labor displacing adult workers, or, on the other hand, forced idleness.[18] The two kinds of statutes—compulsory school attendance and child labor laws—tend to keep children of certain ages off the labor market and in school; this in turn provides opportunity to prepare for a livelihood of a higher order than that children could pursue without education and protects their health in adolescence.

In these terms, Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attend-

[17] 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219.

[18] See materials cited n. 16, *supra;* Casad, Compulsory Education and Individual Rights, in 5 Religion and the Public Order 51, 82 (D. Giannella ed. 1969).

ance for children generally. For, while agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphry of the objectives of such laws.[19] There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.

IV

Finally, the State, on authority of *Prince* v. *Massachusetts,* argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in *Prince,* might be read to give support to the State's position. However, the Court was not confronted in *Prince* with a situation comparable to that of the Amish as revealed in this record; this is shown by the

[19] See, *e. g.*, Abbott, *supra,* n. 16, at 266. The Federal Fair Labor Standards Act of 1938 excludes from its definition of "[o]ppressive child labor" employment of a child under age 16 by "a parent . . . employing his own child . . . in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being." 29 U. S. C. § 203 (*l*).

Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. 321 U. S., at 169–170. The Court later took great care to confine *Prince* to a narrow scope in *Sherbert* v. *Verner*, when it stated:

> "On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfeld* v. *Brown*, 366 U. S. 599, 603. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Prince* v. *Massachusetts*, 321 U. S. 158 . . . ." 374 U. S., at 402–403.

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.[20] The record is to the contrary, and any reliance on that theory would find no support in the evidence.

Contrary to the suggestion of the dissenting opinion of MR. JUSTICE DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it

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[20] Compare *e. g.*, *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); *Wright* v. *DeWitt School District*, 238 Ark. 906, 385 S. W. 2d 644 (1965); *Application of President and Directors of Georgetown College, Inc.*, 118 U. S. App. D. C. 80, 87–90, 331 F. 2d 1000, 1007–1010 (chambers opinion), cert. denied, 377 U. S. 978 (1964).

is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary.[21] The State's position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents—that is, without regard to the wishes of the child. That is the claim we reject today.

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here

[21] The only relevant testimony in the record is to the effect that the wishes of the one child who testified corresponded with those of her parents. Testimony of Frieda Yoder, Tr. 92–94, to the effect that her personal religious beliefs guided her decision to discontinue school attendance after the eighth grade. The other children were not called by either side.

and those presented in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). On this record we neither reach nor decide those issues.

The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14–16 if they are placed in a church school of the parents' faith.

Indeed it seems clear that if the State is empowered, as *parens patriae*, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce* v. *Society of Sisters*, in which the Court observed:

> "Under the doctrine of *Meyer* v. *Nebraska*, 262 U. S. 390, we think it entirely plain that the Act

of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S., at 534–535.

The duty to prepare the child for "additional obligations," referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. *Pierce*, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince*

if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.

V

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.[22] Our disposition of this case, however, in no way

[22] What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In *Walz* v. *Tax Commission*, the Court saw the three main concerns against which the Establishment Clause sought to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U. S. 664, 668 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not

alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this con-

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to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory education law would impose. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert* v. *Verner*, 374 U. S. 398, 409 (1963).

vincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. *Sherbert* v. *Verner*.

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.[23]

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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[23] Several States have now adopted plans to accommodate Amish religious beliefs through the establishment of an "Amish vocational school." See n. 3, *supra*. These are not schools in the traditional sense of the word. As previously noted, respondents attempted to reach a compromise with the State of Wisconsin patterned after the Pennsylvania plan, but those efforts were not productive. There is no basis to assume that Wisconsin will be unable to reach a satisfactory accommodation with the Amish in light of what we now hold, so as to serve its interests without impinging on respondents' protected free exercise of their religion.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring.

This case involves the constitutionality of imposing criminal punishment upon Amish parents for their religiously based refusal to compel their children to attend public high schools. Wisconsin has sought to brand these parents as criminals for following *their* religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so.

This case in no way involves any questions regarding the right of the children of Amish parents to attend public high schools, or any other institutions of learning, if they wish to do so. As the Court points out, there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents. Only one of the children testified. The last two questions and answers on her cross-examination accurately sum up her testimony:

> "Q. So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of *your* religion?
> "A. Yes.
> "Q. That is the only reason?
> "A. Yes." (Emphasis supplied.)

It is clear to me, therefore, that this record simply does not present the interesting and important issue discussed in Part II of the dissenting opinion of MR. JUSTICE DOUGLAS. With this observation, I join the opinion and the judgment of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring.

Cases such as this one inevitably call for a delicate balancing of important but conflicting interests. I join the opinion and judgment of the Court because I cannot

say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.

This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory education law is relatively slight, I conclude that respondents' claim must prevail, largely because "religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society." *Braunfeld* v. *Brown*, 366 U. S. 599, 612 (1961) (BRENNAN, J., concurring and dissenting).

The importance of the state interest asserted here cannot be denigrated, however:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

As recently as last Term, the Court re-emphasized the legitimacy of the State's concern for enforcing minimal educational standards, *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971).[1] *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools.[2] In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish

[1] The challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did analysis under the Free Exercise Clause would be substantially different. See *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Cleveland* v. *United States*, 329 U. S. 14 (1946); *Application of President and Directors of Georgetown College, Inc.*, 118 U. S. App. D. C. 80, 331 F. 2d 1000, cert. denied, 377 U. S. 978 (1964).

[2] "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925).

children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age.[3] A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past. In the circumstances of this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.

Decision in cases such as this and the administration of an exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create a forbidden establishment of religion where it is essential to implement free

[3] Dr. Hostetler testified that though there was a gradual increase in the total number of Old Order Amish in the United States over the past 50 years, "at the same time the Amish have also lost members [of] their church" and that the turnover rate was such that "probably two-thirds [of the present Amish] have been assimilated non-Amish people." App. 110. Justice Heffernan, dissenting below, opined that "[l]arge numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world." 49 Wis. 2d 430, 451, 182 N. W. 2d 539, 549 (1971).

exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective. I join the Court because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the state requirement is great, and because the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school.

MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

It is argued that the right of the Amish children to religious freedom is not presented by the facts of the case, as the issue before the Court involves only the Amish parents' religious freedom to defy a state criminal statute imposing upon them an affirmative duty to cause their children to attend high school.

First, respondents' motion to dismiss in the trial court expressly asserts, not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions. It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their

children as a defense.[1] Although the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis.

Second, it is essential to reach the question to decide the case, not only because the question was squarely raised in the motion to dismiss, but also because no analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. As in *Prince* v. *Massachusetts*, 321 U. S. 158, it is an imposition resulting from this very litigation. As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

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[1] Thus, in *Prince* v. *Massachusetts*, 321 U. S. 158, a Jehovah's Witness was convicted for having violated a state child labor law by allowing her nine-year-old niece and ward to circulate religious literature on the public streets. There, as here, the narrow question was the religious liberty of the adult. There, as here, the Court analyzed the problem from the point of view of the State's conflicting interest in the welfare of the child. But, as MR. JUSTICE BRENNAN, speaking for the Court, has so recently pointed out, "The Court [in *Prince*] implicitly held that the custodian had standing to assert alleged freedom of religion . . . rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself." *Eisenstadt* v. *Baird*, 405 U. S. 438, 446 n. 6. Here, as in *Prince*, the children have no effective alternate means to vindicate their rights. The question, therefore, is squarely before us.

Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has in fact testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller as their motion to dismiss also raised the question of their children's religious liberty.

II

This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education. See *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390. And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. See *Prince* v. *Massachusetts*, *supra*. Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again. In *Haley* v. *Ohio*, 332 U. S. 596, we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault*, 387 U. S. 1, 13, we held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship*, 397 U. S. 358, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.

In *Tinker* v. *Des Moines School District*, 393 U. S. 503, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.

> "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.*, at 511.

In *Board of Education* v. *Barnette*, 319 U. S. 624, we held that schoolchildren, whose religious beliefs collided with a school rule requiring them to salute the flag, could not be required to do so. While the sanction included expulsion of the students and prosecution of the parents, *id.*, at 630, the vice of the regime was its interference with the child's free exercise of religion. We said: "Here . . . we are dealing with a compulsion of students to declare a belief." *Id.*, at 631. In emphasizing the important and delicate task of boards of education we said:

> "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*, at 637.

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanog-

rapher. To do so he will have to break from the Amish tradition.[2]

It is the future of the student, not the future of the parents, that is imperiled in today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.[3] If he is harnessed to the Amish way of life

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[2] A significant number of Amish children do leave the Old Order. Professor Hostetler notes that "[t]he loss of members is very limited in some Amish districts and considerable in others." J. Hostetler, Amish Society 226 (1968). In one Pennsylvania church, he observed a defection rate of 30%. *Ibid.* Rates up to 50% have been reported by others. Casad, Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber, 16 Kan. L. Rev. 423, 434 n. 51 (1968).

[3] The court below brushed aside the students' interests with the offhand comment that "[w]hen a child reaches the age of judgment, he can choose for himself his religion." 49 Wis. 2d 430, 440, 182 N. W. 2d 539, 543. But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity. Children far younger than the 14- and 15-year-olds involved here are regularly permitted to testify in custody and other proceedings. Indeed, the failure to call the affected child in a custody hearing is often reversible error. See, *e. g., Callicott* v. *Callicott,* 364 S. W. 2d 455 (Civ. App. Tex.) (reversible error for trial judge to refuse to hear testimony of eight-year-old in custody battle). Moreover, there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult. See, *e. g.,* J. Piaget, The Moral Judgment of the Child (1948); D. Elkind, Children and Adolescents 75–80 (1970); Kohlberg, Moral Education in the Schools: A Developmental View, in R. Muuss, Adolescent Behavior and Society 193, 199–200 (1971);

by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The views of the two children in question were not canvassed by the Wisconsin courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case.[4]

III

I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test. It is, of course, true that if a group or society was organized to perpetuate crime and if that is its motif, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis. *United States* v. *Ballard*, 322 U. S. 78. But no such factors are present here, and the Amish, whether with a high or low crim-

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W. Kay, Moral Devolpment 172–183 (1968); A. Gesell & F. Ilg, Youth: The Years From Ten to Sixteen 175–182 (1956). The maturity of Amish youth, who identify with and assume adult roles from early childhood, see M. Goodman, The Culture of Childhood 92–94 (1970), is certainly not less than that of children in the general population.

[4] Canvassing the views of all school-age Amish children in the State of Wisconsin would not present insurmountable difficulties. A 1968 survey indicated that there were at that time only 256 such children in the entire State. Comment, 1971 Wis. L. Rev. 832, 852 n. 132 (1971).

inal record,[5] certainly qualify by all historic standards as a religion within the meaning of the First Amendment.

The Court rightly rejects the notion that actions, even though religiously grounded, are outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds* v. *United States*, 98 U. S. 145, 164, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." In that case it was conceded that polygamy was a part of the religion of the Mormons. Yet the Court said, "It matters not that his belief [in polygamy] was a part of his professed religion: it was still belief, and belief only." *Id.*, at 167.

Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

In another way, however, the Court retreats when in reference to Henry Thoreau it says his "choice was philo-

[5] The observation of Justice Heffernan, dissenting below, that the principal opinion in his Court portrayed the Amish as leading a life of "idyllic agrarianism," is equally applicable to the majority opinion in this Court. So, too, is his observation that such a portrayal rests on a "mythological basis." Professor Hostetler has noted that "[d]rinking among the youth is common in all the large Amish settlements." Amish Society 283. Moreover, "[i]t would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." *Id.*, at 300. He also notes an unfortunate Amish "preoccupation with filthy stories," *id.*, at 282, as well as significant "rowdyism and stress." *Id.*, at 281. These are not traits peculiar to the Amish, of course. The point is that the Amish are not people set apart and different.

sophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." That is contrary to what we held in *United States* v. *Seeger*, 380 U. S. 163, where we were concerned with the meaning of the words "religious training and belief" in the Selective Service Act, which were the basis of many conscientious objector claims. We said:

> "Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." *Id.*, at 176.

Welsh v. *United States*, 398 U. S. 333, was in the same vein, the Court saying:

> "In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:
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> "'I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to

recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.*'" *Id.*, at 342.

The essence of Welsh's philosophy on the basis of which we held he was entitled to an exemption was in these words:

"'I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding "duty" to abstain from violence toward another person) is not "superior to those arising from any human relation." On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.'" *Id.*, at 343.

I adhere to these exalted views of "religion" and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race. *United States* v. *Seeger,* 380 U. S., at 192–193 (concurring opinion).